

No. 13562

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK LUEHR and JONES STEVEDORING
CO., a Corporation,

Appellees.

Apostles on Appeal
In Two Volumes
Volume I
(Pages 1 to 359)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Southern District of California, Southern Division

In Admiralty No. 25833

FRANK LUEHR,

Libelant,

vs.

UNITED STATES OF AMERICA, AMERICAN
PACIFIC STEAMSHIP CO., a Corporation,
Respondents.

AMENDED LIBEL IN PERSONAM FOR
DAMAGES
(Personal Injuries)

To the Honorable, the Judges of the United States District Court, in and for the Northern District of California, Southern Division:

The libel of Frank Luehr against the United States of America and the American Pacific Steamship Co., a corporation, in a cause of damages for personal injuries, civil and maritime, alleges:

I.

Libelant now is, and during all the times herein mentioned was, a resident of the County of Alameda, and resident within the jurisdiction of the above-entitled Court.

II.

During all the time herein mentioned respondent United States of America owned and both respondents maintained, operated, navigated, managed and controlled the U. S. N. S. "Shawnee Trail" as a

tankship in interstate and foreign commerce. That said vessel either is now, soon will come, and recently has been within this district.

III.

Libelant brings and maintains this libel under the Suits in Admiralty Act (Act of March 9, 1920, c. 95, § 2; 41 Stat. 525; 46 U.S.C. SS 741-752), under the Public Vessels Act (Act of March 3, 1925, c. 428, § 1, 43 Stat. 112, 46 U.S.C. §781-790), and the General Maritime Law and by virtue thereof, the Court has jurisdiction of the parties and the subject matter.

IV.

That on or about July 28, 1950, at or about the hour of 12:45 p.m., the said U.S.N.S. "Shawnee Trail" was docked at the Port of Alameda, California, at Army Transit Depot No. 3, and was on navigable waters of the United States, namely San Francisco Bay.

V.

At said time and place respondent United States of America owned a certain barge and floating crane, which vessel and crane was operated, managed, maintained and controlled by the United States Army, its personnel and civilian employees.

VI.

At said time and place libelant was in the employ of the Jones Stevedoring Company as a longshoreman and was working aboard the said "Shawnee Trail" in the usual course and scope of his employment and was a business invitee of the respondents.

VII.

At said time and place libelant was working on the mecano deck of said "Shawnee Trail," helping to load cargo and airplanes aboard said vessel. At said time and place respondents so negligently and carelessly managed, operated, maintained and controlled the aforesaid "Shawnee Trail" and floating barge and crane, and so negligently and carelessly, themselves and through their personnel and employees, loaded cargo and particularly an airplane aboard said "Shawnee Trail" that they did cause said cargo and airplane to fall from the hoist by which it was being loaded and it did fall upon libelant, causing him grievous and severe personal injuries as hereinafter described.

VIII.

That the said U.S.N.S. "Shawnee Trail" and floating barge and crane were in an unseaworthy, unsafe and improper condition and were navigated, maintained, managed, operated and controlled in an unseaworthy manner, and the personnel and employees of respondents and respondents themselves committed various unseaworthy acts in loading said cargo and airplane, and as a direct and proximate result there of said cargo and airplane was caused to and did fall upon libelant, causing him grievous and severe personal injuries as hereinafter described.

IX.

That respondent American Pacific Steamship Company failed to furnish libelant with a safe,

proper and seaworthy place in and about which to work, in that said airplane and cargo were being loaded upon what is known as a mecano deck, a deck fabricated above the main deck, and there was no safe, proper, or seaworthy place for libelant to stand and work, but he was required to stand on said mecano deck in a place of danger, and was in such a place of danger and could not escape therefrom when said airplane fell upon him.

X.

That as a direct and proximate result of the negligence and carelessness of respondents, their agents, personnel and employees, and of the unseaworthiness of said U.S.N.S. "Shawnee Trail" and said floating barge and crane, and the unseaworthy acts of respondents and their employees and personnel, and of said cargo and airplane falling upon libelant, the libelant was caused to and he did suffer and incur grievous and severe personal injuries as follows:

1. Compound fractures of the left leg and the tibia and fibula thereof, and injuries to the bones, nerves, joints and muscles of the left leg; osteomyelitis of said leg;

2. Fractures of the left third, fourth, fifth and sixth ribs;

3. Compression fracture with displacement of the first lumbar vertebrae; injury to the spine.

4. Fracture of the left clavicle;

5. Brain concussion;

6. Severe internal injuries;

7. Injuries to other parts of libelant's head and body, the exact nature of which he does not know and prays leave to amend his libel and insert a full description thereof when ascertained, or offer proof thereof at the trial herein.

XI.

Libelant was hospitalized on various occasions and required to have blood transfusions, skin grafting of the left leg, many operations for the removal of dead bone from said leg, and other treatment and attention.

Said injuries caused libelant grievous and severe physical and mental pain and suffering, and he is informed and believes and alleges that the injuries to his body described above are permanent in character and that libelant will not ever be able to resume his work as a longshoreman, or any gainful occupation. Said injuries have caused libelant general damages in the amount of \$200,000.00.

XII.

Libelant has incurred medical expenses on account of said injuries and will incur further medical treatment and attention. That said expenses for medical attention have and will cause libelant special damage in the amount of \$35,000.00.

XIII.

Libelant was gainfully employed as a longshoreman at the time of the aforesaid accident and was earning wages of approximately \$100.00 per week. At the time hereof he has suffered loss of wages to

his special damage in the amount of approximately \$7,200.00. Libelant will be unable to resume any gainful occupation in the future and will suffer future wage loss to his special damage, and prays leave to amend his libel or to offer proof at the time of trial of the wage loss which libelant has sustained or which he is likely to sustain in the future.

XIV.

All and singular the allegations are true and are within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays that pursuant to the statutes made and provided in cases like the instant one that respondents be cited to appear and answer to the libel herein that process issue against respondent American Pacific Steamship Co., and that libelant have decree and judgment against respondents for the sum of \$242,200.00, plus future wage loss and medical expenses, costs of suit herein, and such other and further relief as is meet and just in the premises.

Dated: January 22, 1952.

/s/ HERBERT RESNER,

/s/ RAOUL D. MAGANA,

Proctors for Libelant.

Duly verified.

[Endorsed]: Filed January 23, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, respondent above named, and for answer to the libel of Frank Luehr in personam for damages for personal injuries, admits, denies, and alleges as follows:

I.

Answering unto Article I of said libel, respondent admits the allegation contained therein.

II.

Answering unto Article II of said libel respondent admits the allegation contained therein.

III.

Answering unto Article III of said libel, respondent leaves matters of jurisdiction to the Court.

IV.

Answering unto Article IV of said libel respondent admits the allegation contained therein.

V.

Answering unto Article V of said libel respondent admits ownership of a certain barge and floating crane, but denies that said vessels were operated, managed and controlled by the United States Army, its personnel and civilian employees.

VI.

Answering unto Article V of said libel respondent admits the allegations contained therein.

VII.

Answering unto Article VII of said libel respondent admits that libelant was working on the deck of said U.S.N.S. Shawnee Trail helping load cargo aboard said vessel, but denies each and every, all and singular, the remaining allegations of said Article VII.

VIII.

Answering unto Article VIII of said libel respondent denies each and every, all and singular, the allegations contained therein.

IX.

Answering unto Article IX of said libel respondent denies each and every, all and singular, the allegations contained therein.

X.

Answering unto Article X of said libel respondent alleges that it has not sufficient information or belief to properly answer said allegations, and on said ground denies each and every, all and singular, the allegations therein contained and requires strict proof thereof insofar as material.

XI.

Answering unto Article XI of said libel respondent alleges that it has not sufficient information or belief to properly answer said allegations, and on said ground denies each and every, all and singular, the allegations therein contained and requires strict proof thereof insofar as material.

XII.

Answering unto Article XIII of said libel, respondent denies that all and singular the allegations are true, and leaves the matter of jurisdiction to the Court.

Further Answering Unto Said Libel, and for a First, Separate and Distinct Defense to Said Libel Respondent Alleges as Follows:

XIV.

That any injury to, or damages suffered by libelant were sustained solely by libelant's own negligence in failing to use due or any care for his own safety in the performance of his duties, and/or by the negligence of libelant's employer, Jones Stevedoring Company. Respondent alleges that such damages and injuries, if any there were, were not caused or contributed to in any manner by any fault or negligence of respondent, its servants, agents, or representatives, or by any unseaworthiness of any of said vessels.

Further Answering Unto Said Libel, and for a Second, Separate, and Distinct Defense to Said Libel, Respondent Alleges as Follows:

XV.

Respondent alleges that at the time and place in said libel set forth, libelant was solely an employee of Jones Stevedoring Company, an independent contractor, and was working in the course and scope of his employment aboard said U.S.N.S. Shawnee

Trail as a stevedore; that the damages claimed by libelant were not caused by said vessel or any other vessel owned by the respondent, but, on the contrary, were solely caused by the carelessness and negligence of libelant himself, and/or the carelessness and negligence of libelant's said employer; and that the cause of action stated by said libel is not one respecting which the United States has consented to be sued under the Suits in Admiralty Act, or the Public Vessels Act, or under any other statute or provision of law whatsoever.

Wherefore, respondent prays that the libel may be dismissed with costs.

/s/ CHAUNCEY F. TRAMUTOLO,
United States Attorney.

By /s/ R. B. McMILLAN,
Asst. U. S. Atty.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of
Justice.

[Endorsed]: Filed May 31, 1951.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty No. 25833

FRANK LUEHR,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

JONES STEVEDORING COMPANY, a Corporation,

Respondent-impleaded.

PETITION TO BRING IN THIRD PARTY
UNDER RULE 56

To the Honorable, the Judges of the Above-Entitled Court, Sitting in Admiralty:

The petition of the United States of America, respondent herein, respectfully shows:

I.

Upon information and belief that at all times hereinafter mentioned the Jones Stevedoring Company, a corporation, (hereinafter called "said company"), was and now is a corporation, organized and existing under the laws of the State of California and has a principal place of business in the City and County of San Francisco, State of California, within the jurisdiction of this Court.

II.

That on or about February 23, 1951, Frank Luehr filed a Libel in Personam for damages herein against Petitioner, the United States of America, wherein libelant claims the sum of \$238,000.00, together with special damages, for personal injuries. A copy of said libel is hereto attached, marked "Exhibit A" and, by reference, is made a part hereof;

III.

That on or about January 1, 1950, said company entered into a written contract with Petitioner, the United States of America, whereby said company, referred to in said contract as "the contractor," agreed to load or discharge cargoes and, in connection therewith, to perform all the duties of a stevedore on any vessel which the contracting officer might designate. That under the terms of said contract and in connection with the performance thereof, said company agreed in part in terms as follows:

"Article 1. General Scope of the Contract.

"(b) Contractor's Duties. (1) In loading vessel, the contractor shall remove and handle cargo from open-top railroad cars, trucks, alongside ship, also from barges, lighters, scows and cars on car floats alongside ship, in pier sheds and place of rest on pier. The contractor shall stow said cargo in any space in the vessel, including bunker space, decks, 'tween decks, on deck, fore and aft peaks, and deep tanks, in order directed by and in a manner satis-

factory to the contracting officer, the master of the vessel or his representative.”

“(h) Gear Supplied by Government. (1) The Government, at its own expense, will furnish lighters, floating derricks, and shore cranes. Floating derricks will not be furnished when, in the opinion of the contracting officer, the ship’s equipment can be used satisfactorily.”

“Article 14. Liability and Insurance.

“(a) The Contractor.

“(1) shall be liable to the Government for any and all loss of or damage to cargo, vessels, piers or any other property of every kind and description, and

“(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for cargo, vessels, piers or any other property of every kind and description, whether or not owned by the Government, or bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents, or employees in the performance of work under this contract. The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations.

“(b) The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons.

“(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished

by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents and employees by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.

“(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific directions of the contracting officer.”

IV.

That said contract was at all times material herein, in full force and effect, said contract being designated DA 04-197; TC-246; that at the time of the alleged occurrence of injuries described in the libel, said company was engaged in loading airplanes aboard the U.S.N.S. Shawnee Trail through the use of a derrick barge (BD-3031) owned by the respondent, but loaned to said company pursuant to and under the terms of said contract.

V.

Petitioner further alleges on information and belief, that libelant was injured while performing work aboard said vessel in the course of his employment by said company, in its performance of the said contract; that any injuries sustained by libel-

ant were solely and directly, and proximately caused by the carelessness and negligence of said company, its servants (or borrowed servants) agents, and employees.

VI.

That if petitioner is under any liability by reason of any of the matters alleged in said libel, such liability was solely and proximately caused by the fault and negligence of said company, its servants, agents or employees, in respect to the matters in Article V hereof set forth; by reason thereof any and all such liability should be borne by said company and not by petitioner, and that said company is wholly or partially liable to petition by way of indemnity or contribution, or other remedy over or otherwise, and that said company should be proceeded against by libellant directly and in place and stead of this petitioner.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, petitioner prays:

1. That process in due form of law may issue against the said Jones Stevedoring Company, citing it to appear and answer all and singular the matter of this petition and of the libel herewith exhibited.

2. That said Jones Stevedoring Company be proceeded against as if originally made a party

herein, and that if the Court shall find libelant is entitled to a decree, then that said decree be entered against said Jones Stevedoring Company, and that the Court may dismiss said libel as against the petitioner with costs.

3. That the petitioner may have such other and further relief and redress as the Court is competent to give in the premises.

/s/ CHAUNCEY F. TRAMUTOLO,
United States Attorney.

By /s/ R. B. McMILLAN,
Asst. U. S. Atty.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of Justice, Proctors for Respondent.

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

ANSWER TO PETITION AND LIBEL

Comes now Jones Stevedoring Company, a corporation, respondent-impleaded herein, and answering the petition and libel herein, alleges as follows:

As to the Petition of United States of America:

I.

Admits the allegations of Paragraph I.

II.

Answering the allegations of Paragraph II, admits that on February 23, 1951, libelant herein filed a libel for damages against the United States of America, claiming certain damages for personal injuries. Said Paragraph II by reference makes the libel a part of said petition and respondent-impleaded hereinafter will answer each and every, all and singular, the allegations of the libel.

III.

Answering the allegations of Paragraph III, admits that on or about January 1, 1950, respondent-impleaded entered into a written contract for stevedoring services with respondent, United States of America. Admits that said contract provides in part as alleged in the petition of respondent, United States of America, beginning with the words "Article 1," line 15, at page 2, to and including the words "Contracting Officer," at line 15 of page 3 of respondent's petition.

Alleges that said contract further provides in part under Article 1 (b) (2) that respondent-impleaded, designated in the contract as "Contractor," shall do work on vessels wherever designated by respondent, United States of America, and also on "the order directed by, and in a manner satisfactory to, the Contracting Officer or his rep-

representative," said Contracting Officer being designated under the contract as the representative of the United States of America.

Alleges that said contract further provides under Article 1:

"(h)1. Gear Supplied by Government. The Government, at its own expense, will furnish lighters, floating derricks, and shore cranes. Floating derricks will not be furnished when, in the opinion of the Contracting Officer, the ship's equipment can be used satisfactorily.

"(h)2. The Government, at its own expense, will furnish and maintain in good working order the following: Masts, booms, blocks, preventers and gantlines rigged on booms; wire/or rope falls, rigged; winches, complete with necessary power and steam; lights on wharves and vessels."

That pursuant to the foregoing provision of the contract, respondent, United States of America, through its Contracting Officer determined that the equipment of the U.S.N.S. Shawnee Trail was not satisfactory for the purpose of taking aboard government owned cargo, namely, airplanes and, therefore, provided and used a floating derrick and crane which was exclusively owned, navigated, operated, managed and controlled by workers who were at all times herein mentioned solely and exclusively in the employ of respondent, United States of America, subject only to its direction and control.

Alleges that said contract further provides under Article 1 (n)(2) as follows:

“Cargo stowed on deck shall be secured to the satisfaction of the contracting officer and the master of the vessel or his representative. Such securing will be at the expense of the Government and the contractor (respondent-impleaded) will be compensated therefor at the extra labor rates set forth in Article 2, Schedule II.”

Alleges that it is further provided in said contract as follows:

“Article 2. Schedule of Rates

“Stevedoring Services—

“Schedule of Commodity Rates

“Commodity Tonnage Rates. The Contractor will be compensated at the commodity rates listed herein which rates are based on straight-time rates of pay only. The ship’s gear rates are based on normal operation involving use of ship’s gear. The application of derrick rates are based upon the use of floating derricks or shore cranes for the purpose of expedient handling of cargo.

Per Ton 2240 Pounds or 40 Cubic Feet (Which-ever Shall Produce the Greater Tonnage)

	Loading		Discharging	
	WT or MT		WT or MT	
	Ship’s Gear	Derrick	Ship’s Gear	Derrick
1. Vehicles, Airplanes (fuselage)				
Boxed89	.76	.68	.54
Unboxed71	.67	.59	.47

“An Airplane (fuselage) shall be considered as being not in excess of 150 manifest tons, even though it exceeds that figure.”

Alleges that under said Article 2 of the contract that in addition to the foregoing item, there are twelve further items under said schedule of rates in which the rate per ton payable to the Contractor (respondent-impleaded) on operations involving a floating derrick are specified on a lower basis than for use of ship's gear. That pursuant to the foregoing provisions, the work done by respondent-impleaded at the time of the injuries alleged in the libel involved loading unboxed airplanes for which respondent, United States of America, paid respondent-impleaded at the rate of 67c per ton by reason of the fact that said work involved the use of a floating derrick which was then and there owned, provided and exclusively operated and controlled by respondent, United States of America.

Alleges that said Contract further provides as follows:

“Article 10. Employees of Contractor. All employees of the Contractor employed in performance of work under this contract shall be employees of the Contractor at all times and not of the Government. The Contractor shall comply with the Social Security Act, the Longshoremen's and Harbor Worker's Compensation Act, and such Workmen's Compensation Laws and Unemployment Insurance Laws of the State where the work is performed as shall be applicable to work performed hereunder and the Contractor shall comply with all other relevant legislation, State and Federal.

“Article 11. Removal of Employees of Contractor. Contracting Officer (respondent, United

States of America) may require that the Contractor (respondent-impleaded, Jones Stevedoring Company) remove such employees as the Contracting Officer deems incompetent, careless, insubordinate or otherwise objectionable and whose continued employment with respect to the services to be performed under this contract is deemed by the Contracting Officer to be contrary to the public interest."

Denies each and every, all and singular, the remaining allegations contained in Paragraph III.

IV.

Admits that said contract was at all times mentioned herein in full force and effect, said contract being designated DA 04-197; TC-24; and that at the time of the alleged occurrence of injuries described in the libel, respondent-impleaded, pursuant to said contract and at the specific direction of respondent, United States of America, provided and had brought aboard the U.S.N.S Shawnee Trail certain of its employees, including libelant, Frank Luehr, for the purpose of guiding into place on the deck of said U.S.N.S. Shawnee Trail certain airplanes which were cargo owned by respondent, United States of America.

Alleges that said airplanes were being hoisted aboard U.S.N.S. Shawnee Trail by means of a derrick crane attached to Derrick Barge BD-3031 which was exclusively owned, controlled, navigated, managed and operated by said respondent, United States of America, and that at the time of the

alleged occurrence of injuries described in the libel, an airplane owned by respondent, United States of America, was being hoisted aboard the U.S.N.S. Shawnee Trail by means of the crane attached to and a part of the said derrick barge, which was then and there being operated solely and exclusively by an employee of respondent, United States of America. Specifically denies that said derrick barge was loaned by respondent, United States of America, to respondent-impleaded, pursuant to the terms of said contract or otherwise or at all; and alleges in this connection that the said derrick barge was at all of the times herein mentioned exclusively owned, operated, navigated, managed and controlled by respondent, United States of America, its officers, agents and employees. Denies each and every, all and singular, the remaining allegations of Paragraph IV.

V.

Answering the allegations of Paragraph V, admits that libelant was injured while performing services aboard said vessel in the course of his employment by respondent-impleaded. Denies that there was any carelessness or negligence on the part of said respondent-impleaded, its servants, agents, employees, or allegedly borrowed servants, which solely or directly, or proximately, or at all caused or contributed to the happening through which libelant alleges to have been injured.

Denies specifically that the said crane operator was its servant, agent, employee or allegedly bor-

rowed servant, and specifically denies that it exercised, attempted to exercise, or had any right to exercise any direction, control or management over said crane operator.

VI.

Answering the allegations of Paragraph VI, alleges that if there were any carelessness or negligence proximately causing libelant's injuries, such carelessness or negligence was solely that of respondent, United States of America, its servants, agents, and employees.

It is specifically denied that there was any carelessness or negligence on the part of respondent-impleaded, or that it is wholly or partially or at all liable to petitioner by way of indemnity or contribution or other remedy over or otherwise.

Denies each and every, all and singular, the remaining allegations of Paragraph VI.

VII.

Denies each and every, all and singular, the allegations of Paragraph VII, and alleges that this court is without jurisdiction to entertain the petition herein or assess any liability as against this respondent-impleaded.

As to the Libel:

I.

Admits the allegations of Paragraph I.

II.

Admits the allegations of Paragraph II.

III.

Denies that the above-entitled court has jurisdiction to entertain this cause against this respondent-impleaded, pursuant to said statutes alleged in said Paragraph III, or otherwise, or at all. Denies each and every, all and singular, the remaining allegations of Paragraph III.

IV.

Admits the allegations of Paragraph IV.

V.

Admits the allegations of Paragraph V.

VI.

Admits the allegations of Paragraph VI.

VII.

Answering the allegations of Paragraph VII, denies upon lack of information and belief, each and every, all and singular, the allegations of Paragraph VII.

VIII.

Denies each and every, all and singular, the allegations of Paragraph VIII.

IX.

Answering the allegations of Paragraph IX, alleges that said libelant's injuries as set forth therein were not caused or contributed to by any alleged carelessness or negligence on the part of this respondent-impleaded or its agents, servants or employees.

X.

Answering the allegations of Paragraph X, admits that libelant sustained certain injuries to his body and person, the exact nature of which are presently unknown to respondent-impleaded. Denies that libelant has been damaged in the sum of \$200,000.00 or in any other sum or sums, or otherwise, or at all insofar as this respondent-impleaded is concerned or charged.

XI.

Denies the allegations of Paragraph XI.

XII.

Answering the allegations of Paragraph XII, this respondent-impleaded has no belief or information as to said allegations and on that ground denies generally and specifically all of the allegations thereof.

XIII.

Denies the allegations of Paragraph XIII.

As and for a Second, Separate and Distinct Answer and Defense to Said Petition of United States of America and to the Said Libel Herein, respondent-impleaded, Jones Stevedoring Company, alleges that at the time and place of the event wherein libelant received his injuries, said libelant was a longshoreman employed by respondent-impleaded and that the sole and exclusive remedy of libelant and of respondent, United States of America, as against this respondent-impleaded is pursuant and limited to the provisions of the Longshoremen's and

Harbor Workers' Compensation Act (33 U.S.C. 901-950).

As and for a Third Separate and Distinct Answer and Defense to Said Petition of United States of America and to the Said Libel Herein, respondent-impleaded alleges that if there is any liability on its part to libelant or to respondent, United States of America, which is hereby specifically denied, such liability is limited to the extent of any liability respondent-impleaded may have pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901-950).

As and for a Fourth Separate and Distinct Answer and Defense to Said Petition of United States of America and to the Said Libel Herein, respondent-impleaded alleges that the above court has no jurisdiction to entertain the petition herein or to assess any liability as against this respondent-impleaded.

Wherefore, respondent-impleaded prays that the petition of United States of America herein be dismissed and said petitioner take nothing by way of indemnity or contribution or other remedy over, or otherwise against this impleaded-respondent, either by the allegations of the petition or said libel attached thereto.

/s/ JOHN H. BLACK,

/s/ EDW. R. KAY,

Proctors for Jones Stevedoring Company, a Corporation, the Respondent-Impleaded.

State of California,
City and County of San Francisco—ss.

Allen H. Jones, being first duly sworn, deposes and says:

That he is an officer, to wit: Vice President of Jones Stevedoring Company, a corporation, the respondent-impleaded in the above-entitled action, and as such vice-president he is authorized to and does hereby make this verification on behalf of said corporation; that he has read the foregoing answer to petition and libel and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

/s/ ALLEN H. JONES.

Subscribed and sworn to before me this 21st day of September, 1951.

[Seal] /s/ ROBERT C. TAYLOR, JR.,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires February 15, 1953.

Receipt of copy acknowledged.

[Endorsed]: Filed September 24, 1951.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Tuesday, the 4th day of December, in the year of our Lord one thousand nine hundred and fifty-one.

Present: the Honorable Oliver J. Carter,
District Judge.

[Title of Cause.]

ORDER DENYING MOTION FOR
CONTINUANCE OF TRIAL DATE

In this case J. Stewart Harrison, Esq., appearing as proctor for the United States, made a motion for continuance of the trial date, which motion was ordered denied. Said motion denied was to continue trial date from December 10th to December 12th, 1951.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Fri-

day, the 7th day of December, in the year of our Lord one thousand nine hundred and fifty-one.

Present: the Honorable Oliver J. Carter,
District Judge.

[Title of Cause.]

ORDER DENYING EXCEPTIONS OF THE
JONES STEVEDORING CO. TO THE
PETITION AND TO THE LIBEL

The exceptions of the Jones Stevedoring Company to the Petition and to the Libel having been heretofore submitted, and due consideration having been thereon had, It Is Ordered that said exceptions be, and the same are hereby, denied.

[Title of District Court and Cause.]

MOTION TO ADD PARTY RESPONDENT

Comes now the Libelant herein, Frank Luehr, and pursuant to Admiralty Rule 5 of the above-entitled Court, moves to add a new party respondent herein, namely American Pacific Steamship Company, a corporation.

Said motion is made upon the ground that the said American Pacific Steamship Company, a corporation, during the times herein mentioned, was the operator of the U.S.N.S. Shawnee Trail.

Dated: January 19th, 1952.

/s/ HERBERT RESNER,

/s/ RAOUL D. MAGANA,

Proctors for Libelant.

[Endorsed]: Filed January 23, 1952.

[Title of District Court and Cause.]

ORDER ADDING PARTY RESPONDENT
(Admiralty Rule 5)

Good Cause Appearing to the Court Therefor,
It Is Hereby Ordered that American Pacific
Steamship Company, a corporation, be added as a
party respondent herein and that citation in per-
sonam issued against it.

Dated: January 23, 1952.

/s/ OLIVER J. CARTER,
Judge of the United States
District Court.

[Endorsed]: Filed January 23, 1952.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District
Court for the Northern District of California,
Southern Division, held at the Courtroom thereof,
in the City and County of San Francisco, on Mon-
day, the 17th day of March, in the year of our Lord
one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 17, 1952

This case came on regularly this day for trial
before the Court sitting without a jury.

Herbert Resner, Esq., and Raoul Magana, Esq., appearing as Proctors for Libelant. Stewart Harrison, Esq., appeared on behalf of the respondent, United States of America. James T. Cooper, Esq., appeared on behalf of the respondent, American-Pacific Steamship Company. John Black, Esq., and Edward Kay, Esq., appeared on behalf of the respondent, Jones Stevedoring Company.

Opening statements were made by the respective proctors on behalf of their various clients.

Marlyn Osborn and Masako Abe were sworn and testified as to hospital records, on behalf of libelant. Libelant introduced in evidence and filed certain exhibits which were marked Libelant's Exhibits 1 to 15, inclusive.

Ted Spirz and Lester R. Paul were sworn and testified on behalf of libelant.

James B. Waters was sworn and testified on behalf of the 3rd Party Respondent, Jones Stevedoring Company. Said Jones Stevedoring Company introduced in evidence and filed a certain exhibit which was marked No. A-1-J.

The hour of adjournment having arrived, the further trial of this case was ordered continued to March 18, 1952.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Tuesday, the 18th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL — ORDER DENYING
LIBELANT'S MOTION TO DISMISS AS
TO AMERICAN-PACIFIC S. S. CO., WITH-
OUT PREJUDICE

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Ted Spirz was recalled and further testified on behalf of libelant. The respondent introduced in evidence and filed a certain exhibit which was marked Respondent's Exhibit A.

Libelant moved the Court to dismiss as to the respondent, American-Pacific S. S. Co., which motion was ordered denied, without prejudice.

Benny Johnson and Frank Padulo were sworn and testified on behalf of the respondent, United States of America.

Frank Luehr, libelant, was sworn and testified on his own behalf. Libelant introduced in evidence

and filed certain exhibits which were marked Libelant's Exhibits Nos. 16 to 20, inclusive.

The hour of adjournment having arrived, the further trial of this case was ordered continued to March 19, 1952, at 10 o'clock a.m.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Wednesday, the 19th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 19, 1952

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Frank Luehr, libelant, was recalled and further testified in his own behalf. Walter Walker was sworn and testified on behalf of libelant. Libelant introduced in evidence and filed certain exhibits which were marked Libelant's Exhibits Nos. 3-A to 3-J, inclusive; 1-A to 1-D, inclusive; and 20 to 36, inclusive.

The hour of adjournment having arrived, the further trial of this case was ordered continued to March 20, 1952, at 10 o'clock a.m.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco on Thursday, the 20th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 20, 1952

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Keene Hauldeman, Matthew Mogan, Max Rosenstock and Fred Nystrom were sworn and testified on behalf of the respondents. The Jones Stevedoring Co., 3rd Party Respondent, introduced in evidence and filed a certain exhibit which was marked Respondent's Exhibit B-1.

Libelant introduced in evidence and filed a certain exhibit which was marked Libelant's Exhibit No. 37.

The hour of adjournment having arrived, the further trial of this case was ordered continued to March 21, 1952, at 10 o'clock a.m.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Friday, the 21st day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 21, 1952

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Frank Green, Martin Ingbritsen, Fay Elzey, Daniel M. Patterson, Andrew Schmiz and Charles Lehmkehl were sworn and testified on behalf of respondent. Respondent introduced in evidence and filed certain exhibits which were marked Respondent's Exhibits B, C, D.

Libelant interrogated respondent's witness Martin Ingbritsen as Libelant's witness.

Dan Hollbrok, Walter Moore and James Bauman were sworn and testified on behalf of the Jones Stevedoring Co., 3rd Party Respondent.

Libelant introduced in evidence and filed certain exhibits which were marked Libelant's Exhibits Nos. 38 and 39.

The hour of adjournment having arrived, it is ordered that the further trial of this case be continued to March 24, 1952, at 10 o'clock a.m.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 24th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—ORDER GRANTING
LIBELANT'S MOTION TO DISMISS AS
TO AMERICAN-PACIFIC S.S. CO.

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Timothy O'Brien and Stanley C. Davis were sworn and testified on behalf of the Jones Stevedoring Co., 3rd party respondent. Thereupon said Jones Stevedoring Co., rested.

Libelant moved that the 3rd party respondent, American-Pacific S. S. Co., be dismissed, which said motion was ordered granted.

After hearing arguments by the respective proctors, and the hour of adjournment having arrived, it is ordered that the further trial of this case be continued to Tuesday, March 25, 1952, at 10 o'clock a.m.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Tuesday, the 25th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 25, 1952

Case Dismissed as to Jones Stevedoring Co., Without Prejudice; Judgment for \$125,000 Entered in Favor of Libelant.

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

After further arguments by respective counsel, and upon motion of Mr. Kay, it is Ordered that this case be dismissed as to Jones Stevedoring Co., without prejudice. Further Ordered that judgment be entered for the libelant and against the respondent, United States of America, in the amount of One Hundred Twenty-five Thousand Dollars (\$125,000.00) and costs. Findings and Judgment to be prepared by proctor for libelant.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW AND FINAL DECREE SUBMITTED
BY PROCTORS FOR LIBELANT FRANK
LUEHR

The above-entitled matter having come on for hearing on the 17th, 18th, 19th, 20th, 21st, 24th and 25th days of March, 1952, and evidence both oral and documentary having been introduced, the libelant being represented by Herbert Resner and Raoul D. Magana, and the respondent United States of America being represented by Chauncey Tramutolo, United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General, and J. Stewart Harrison, Attorney, Department of Justice, and respondent-impleaded Jones Stevedoring Company, a corporation, being represented by John H. Black and Edward R. Kay, and the respondent American Pacific Steamship Co., a corporation, being represented by Dorr, Cooper and Hayes and J. T. Cooper, having been heretofore dismissed as a party respondent, and after due deliberation, the Court makes its

Findings of Fact

I.

It is true that libelant Frank Luehr is and during all the times herein mentioned was a resident of the County of Alameda, State of California, and resident within the jurisdiction of the above-entitled Court.

II.

It is true that during all the times involved in this cause the respondent United States of America owned a certain tank ship known and designated as the USNS "Shawnee Trail," which vessel was operated by the respondent American Pacific Steamship Company pursuant to a contract between that company and United States of America, in interstate and foreign commerce.

III.

It is true that libelant brought and maintained the amended libel herein under the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U.S.C. §§ 741-752), under the Public Vessels Act (Act of March 3, 1925, c. 428, 43 Stat. 112, 46 U.S.C. §§ 781-790), and the General Maritime Law.

IV.

It is true that on July 28, 1950, in the forenoon, the said USNS "Shawnee Trail" was docked at the port of Alameda, California, at Army Transit Depot No. 3, and was afloat on navigable waters of the United States.

V.

It is true that at all times mentioned in said amended libel respondent United States of America owned a certain barge and floating crane designated as Army Barge BD 3031, which barge and crane were then and there, and at all times material herein, operated, managed, maintained and controlled exclusively by United States of America,

acting through the United States Army, its personnel and civilian employees.

VI.

It is true that at the times mentioned in said amended libel, libelant was in the employ of Jones Stevedoring Company as a longshoreman, and was then and there necessarily working aboard said USNS "Shawnee Trail" in the usual and customary scope and course of his employment.

VII.

It is true that at the times and places mentioned in said amended libel, libelant was working on the mecano deck of the said USNS "Shawnee Trail" helping to load a jet airplane aboard said vessel. It is true that said jet airplane was raised from a barge alongside said USNS "Shawnee Trail" by said barge and floating crane BD 3031, carried over the deck of the said USNS "Shawnee Trail" by said derrick, and lowered to a point above the mecano deck of said USNS "Shawnee Trail." It is true that said plane had been stopped by respondent United States of America a distance of approximately three to six feet above said mecano deck. It is true that the operation of raising, carrying over, lowering and stopping said jet airplane, and of operating said crane, as found herein, was done solely and exclusively by respondent United States of America. It is true that at said time and place United States of America so negligently and carelessly managed, operated, maintained and con-

trolled the aforesaid barge and floating crane BD 3031 that they did cause said jet airplane to fall from the hoist by which it was being loaded and it did fall upon the libelant, causing him grievous and severe personal injuries as hereinafter found.

VIII.

It is not true that at the time and place mentioned in the amended libel that the said USNS "Shawnee Trail" or the barge and floating crane BD 3031 were unseaworthy, but it is true that said barge and floating crane BD 3031 was carelessly and negligently operated and controlled by respondent United States of America and it is true that as a sole direct and proximate result of said negligence and carelessness a jet airplane was caused to and it did fall upon the libelant, crushing him and causing him grievous and severe personal injuries as hereinafter found.

IX.

It is true that the fact that libelant was working on the mecano deck did not in any way contribute to or cause the accident or injuries as found herein.

X.

It is not true that libelant's injuries were caused by any unseaworthiness of the said USNS "Shawnee Trail" or said barge and floating crane BD 3031, but it is true that as a sole, direct and proximate result of the exclusive negligence and carelessness of respondent United States of America a jet airplane was caused to and did fall upon libel-

ant, and libelant thereby was caused to and did incur grievous and severe personal injuries as follows:

1. Compression fracture of the first lumbar vertebra, with marked displacement posteriorly, and anterior wedging.

2. Fracture of the neural arch of the first lumbar vertebra.

3. Fractures of several transverse processes and lamina of the vertebrae.

4. Derangement of the lumbar-sacral joint, with a complete collapse of the fifth lumbar interspace.

5. Injury to several of the intervertebral discs in the lumbar spinal area.

6. Contusion of the spinal cord, and scar tissue in the cord.

7. A mesenteric thrombosis, resulting in a paralytic ilias, or paralysis of the bowel.

8. Trombo phelebitis of both legs.

9. Oblique fracture of the left clavicle.

10. Fractures of at least six ribs and a tremendous concussion injury of the entire chest.

11. A compound comminuted fracture of the left tibia, with removal of the anterior cortex, and osteomyelitis.

12. Fractures of the left fibula at both the upper and lower ends.

13. Avulsion fracture of the right astragalus.

XI.

It is true that libelant was hospitalized for a period in excess of 100 days immediately following his injuries and that various life saving methods were employed in order to save his life, including blood transfusions, catheters in his bladder, rectal tubes and enemas, intravenous feeding, anti-biotics and other methods. It is true that libelant developed osteomyelitis of the left tibia which has required six surgical operations to date and various skin grafts and other treatment. It is true that libelant has been under the continuous treatment of a physician and surgeon from the time of said injury until the date hereof and is still undergoing active treatment.

It is true that libelant has suffered permanent injuries as follows:

1. Spinal injuries which will require surgical fusion of the spine, which may relieve libelant of some future pain, but which will leave him with a permanent, serious and extensive spinal disability.

2. Spinal cord injury, resulting in scar tissue in spinal cord, which has left the spinal cord in a permanently damaged condition.

3. An active and still present osteomyelitis of the left tibia, which will require further surgical intervention and which osteomyelitis will remain as a permanent disability.

4. A portion of the anterior cortex of libelant's left tibia has been removed and libelant's left leg has been permanently shortened.

5. Traumatic arthritis of the left hip which will remain as a permanent disability.

6. Traumatic arthritis of the right ankle which will remain as a permanent disability.

7. A demineralization of the bones of the left hip, right ankle and left tibia.

8. Fractures of the left fibula which have not united and will not unite at the upper end and have united tenuously with over-riding at the lower end.

All of the said injuries caused the libelant to suffer severe and excruciating pain, suffering, distress, humiliation and anxiety and have caused libelant to lose much sleep and rest. Said permanent injuries to libelant's spine, back, left hip, left leg and right ankle presently cause and will in the future cause libelant severe, extreme and excruciating pain, suffering, distress, anxiety and humiliation, and the operations which libelant will be forced to undergo in the future will cause him severe and extreme pain, suffering, worry, distress and anxiety.

It is true that libelant will be required to undergo active medical treatment for a period of approximately fifteen months after the date hereof and will have to be treated medically for the remainder of his life for said injuries.

It is true that libelant is permanently and completely disabled for any kind of physical labor, but may possibly at some uncertain future date be able to engage in some type of sedentary occupation, requiring his brain rather than his physique. Libelant is untrained and unqualified for any kind of work other than physical labor.

Libelant was born on March 11, 1899, and at the time hereof is 53 years of age, with a life expectancy of between 20 and 21 years.

XII.

It is true that libelant has incurred medical expenses on account of said injuries to the date hereof in the amount of \$7,322.32, which has been paid by his employer's compensation insurance carrier. It is true that libelant will be caused to incur expenses for medical, surgical and hospital treatment in the future and will require medical attention for the rest of his life.

XIII.

It is true that libelant was gainfully employed as a longshoreman at the time of the accident and was earning wages of approximately \$64.00 per week, averaged over a period of 2½ years prior to his injury. It is true that from the time of libelant's injury on July 28, 1950, until the date hereof that the average weekly earnings of a longshoreman in the Port of San Francisco has amounted to approximately \$87.00 per week and had libelant not been injured and been able to work, it is true that he could have earned approximately the sum of \$7,500.00 during the period from his injury to date.

XIV.

It is true that all and singular the premises are within the Admiralty and Maritime jurisdiction of this Court.

XV.

It is true that as a result of the injuries sustained by libelant as found herein, and by virtue of his permanent disability, pain and suffering, and his general and special damages, the Court finds that he has suffered and been damaged in the total sum of \$125,000.00.

From the above Findings of Fact, the Court makes its Conclusions of Law:

I.

That the Court has jurisdiction of the parties and the subject matter by virtue of and pursuant to the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U.S.C. §§ 741-752), the Public Vessels Act (Act of March 3, 1925, c. 428, 43 Stat. 112, 46 U.S.C. §§ 781-790), and the General Maritime Law.

II.

That the libelant has met the burden of proof of all the material allegations contained in his amended libel.

III.

That the libelant is entitled to have and recover from respondent United States of America, a sovereign, the sum of \$125,000.00, as and for general and special damages, with interest thereon at 4% per annum from the date hereof, and costs of Court.

IV.

That a decree be entered herein in favor of libelant Frank Luehr and against respondent United States of America, a sovereign, in the sum of \$125,-

000.00, with interest thereon at the rate of 4% per annum from the date hereof, and costs of Court.

Let the decree be entered.

Dated: March, 1952.

.....,

Judge of the U. S. District Court.

/s/ HERBERT RESNER,

/s/ RAOUL D. MAGANA,

Proctors for Libelant.

Receipt of copy acknowledged.

Lodged March 28, 1952.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Thursday, the 10th day of April, in the year of our Lord one thousand nine hundred and fifty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ORDER FOR SETTLEMENT OF FINDINGS OF FACT

This case came on regularly this day for settlement of findings of fact. After arguments by coun-

sel for respective parties, it is Ordered that the Findings be, and are hereby, settled as per Findings of Fact and Conclusions of Law and Judgment this day signed and filed.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW SUBMITTED BY JONES STEVE-
DORING COMPANY, RESPONDENT-IM-
PLEADED

The above-entitled matter having come on for hearing on the 17th, 18th, 19th, 20th, 21st, 24th and 25th days of March, 1952, and evidence both oral and documentary having been introduced, the libellant being represented by Herbert Resner and Raoul D. Magana, and the respondent United States of America being represented by Chauncey Tramutolo, United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General, and J. Stewart Harrison, Attorney, Department of Justice, and respondent-impleaded Jones Stevedoring Company, a corporation, being represented by John H. Black and Edward R. Kay, and the respondent American Pacific Steamship Co., a corporation being represented by Dorr, Cooper and Hays and J. T. Cooper, having been heretofore dismissed as a party respondent, and after due deliberation, the Court makes its

Findings of Fact

I.

It is true that at all times mentioned in the libel herein Jones Stevedoring Company, a corporation, was and now is a corporation organized and existing under the laws of the State of California, and has a principal place of business in the City and County of San Francisco, State of California, within the jurisdiction of this Court.

II.

It is true that on or about January 23, 1952, Frank Luehr filed an Amended Libel in Personam against United States of America and American Pacific Steamship Co., wherein libelant claimed the sum of \$242,200.00 together with special damages for personal injuries. That on February 25, 1952, respondent United States of America filed a petition bringing in Third Party, Jones Stevedoring Company, a corporation, under Admiralty Rule No. 56 of the United States Supreme Court, and in said petition incorporated by reference the allegations contained in said amended libel, and this Court finds and incorporates herein and makes a part hereof the Findings of Fact made and found in respect to the amended libel of libelant as herein as though the same were set forth in full herein.

III.

It is true that on or about January 1, 1950, Jones Stevedoring Company entered into a written contract with respondent United States of America

whereby said Jones Stevedoring Company, referred to in said contract as "the contractor," agreed to load or discharge cargoes, and in connection therewith to perform all of the duties of a stevedore on any vessel which the contracting officer might designate. That under the terms of said contract and in connection with the performance thereof among other things, the parties to said contract agreed in part in terms as follows:

"Article 1. General Scope of the Contract.

"(b) Contractor's Duties. (1) In loading vessels, the contractor shall remove and handle cargo from open-top railroad cars, trucks, alongside ship, also from barges, lighters, scows and cars on car floats alongside ship, in pier sheds and place of rest on pier. The contractor shall stow said cargo in any space in the vessel, including bunker space, decks, 'tween decks, on deck, fore and aft peaks, and deep tanks in order directed by and in a manner satisfactory to the contracting officer, the master of the vessel or his representative."

"(h) Gear Supplied by Government. (1) The Government at its own expense, will furnish lighters, floating derricks, and shore cranes. Floating derricks will not be furnished when, in the opinion of the Contracting Officer, the ship's equipment can be used satisfactorily."

"Article 14. Liability and Insurance.

"(a) The Contractor.

"(1) shall be liable to the Government for

any and all loss of or damage to cargo, vessels, piers or any other property of every kind and description, and

“(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for cargo, vessels, piers or any other property of every kind and description, whether or not owned by the Government, or bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents, or employees in the performance of work under this contract. The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations.

“(b) The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons.

“(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents and employees by the exercise of due diligence could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.

“(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific direction of the Contracting Officer.”

IV.

It is true that said contract at all times material was in full force and effect, said contract being designated DA 04-197; TC-246; and it is true that at the time of the occurrence of the injury described in the amended libel said Jones Stevedoring Company was engaged in loading jet airplanes aboard the USNS Shawnee Trail. It is not true that said derrick barge No. BD 3031 which was owned by respondent United States of America, was loaned to Jones Stevedoring Company pursuant to or under the terms of said contract, or at all, and it is true that said derrick barge No. BD 3031 was manned, operated and controlled exclusively, and to the exclusion of all others, by the United States of America, and it is true that respondent-impleaded Jones Stevedoring Company had no direction or control of the use or management or operation of said derrick barge.

V.

It is true that libelant was injured while performing work aboard the vessel USNS Shawnee Trail in the course of his employment by Jones Stevedoring Company, which said work was in performance of the said contract. It is not true that

any injuries sustained by the libelant were caused in whole and/or in part or at all by the carelessness and/or negligence of Jones Stevedoring Company in directing said libelant to stand under a swinging load in a precarious position several yards above the main deck of the vessel and/or in failing to provide and/or request any decking and/or scaffolding and/or other safety appliances for the use of said libelant. It is true that Jones Stevedoring Company did not direct libelant to stand under a swinging load in a precarious position several yards above the deck of the vessel, and it is true that decking and/or scaffolding and/or other safety appliances were not required or necessary and that Jones Stevedoring Company was not required or under any duty to provide or request any of these appliances. It is not true that said injuries suffered by libelant, or any of them, were in any way caused in whole or in part by any act or negligence and/or carelessness upon the part of Jones Stevedoring Company, its employees, servants or agents, and it is true that all of the injuries suffered by libelant were caused solely and exclusively by the negligence of respondent United States of America.

VI.

It is true that United States of America is liable for damages to libelant under the amended libel herein, but such liability was neither in whole or in part proximately, or at all, caused by or contributed to by the fault or negligence of Jones Stevedoring Company, its employees, agents, or servants, but

said liability is exclusively that of United States of America, its exclusive negligence having been the sole and proximate cause of the accident and injuries to libelant herein. It is not true that Jones Stevedoring Company is obligated under the contract or otherwise, or at all, to respond to United States of America either by way of contribution or indemnity under said contract or otherwise, or at all, and this Court finds that there is no liability on the part of Jones Stevedoring Company under the terms of said contract, or otherwise, or at all.

VII.

That all and singular the premises are within the Admiralty and Maritime jurisdiction of the above-entitled Court.

VIII.

That under the terms of said contract, and in connection with the performance thereof, among other things, the parties to said contract agreed further, in part, in terms as follows:

“Article 14. Liability and Insurance.

“(c) The Contractor shall at its own expense procure and maintain during the term of this contract, insurance as follows:

“(1) Standard Workmen’s Compensation and Employers’ Liability Insurance and Longshoremen’s and Harbor Workers’ Compensation Insurance, or such of these as may be proper under applicable state or federal statutes. The Contractor may, however, be self-insurer against the risk in this subparagraph

(1) if it has obtained the prior approval of the Contracting Officer. This approval will be given upon receipt of satisfactory evidence that the Contractor has qualified as such self-insurer under applicable provisions of law.

“(2) Bodily Injury Liability insurance in an amount of not less than \$50,000 any one accident or occurrence.

“(3) Property Damage Liability insurance (which shall include any and all property, whether or not in the care, custody or control of the Contractor) in an amount of not less than \$250,000 on account of any one accident.”

IX.

That said Contractor, (Jones Stevedoring Company) did procure insurance pursuant to the terms of said contract from the Fireman's Fund Insurance Company of San Francisco.

X.

That said insurance contracts provide by indorsement

“Anything in the policy to the contrary notwithstanding, it is understood and agreed that the company waives all right of subrogation against the United States of America that it might have by reason of payment under this policy.”

XI.

That the issue of whether or not Jones Stevedoring Company and/or Fireman's Fund Insurance

Company must reimburse the United States for such portion of the liability herein occasioned by cost of medical attention past and future, although argued and presented, is not properly determinable in this action.

XII.

That the issue of whether or not the Jones Stevedoring Company and/or Fireman's Fund Insurance Company must reimburse the United States for such portion of the liability herein founded on loss of earnings so far as compensable under the provisions of the Longshoremen's and Harbor Workers' Act and the contracts of insurance therein referred to, although argued and presented, is not properly determinable in this action.

From the above Findings of Fact, the Court makes its

Conclusions of Law

I.

That respondent United States of America was negligent, and its negligence was the sole proximate cause of the accident and resulting injuries to libellant. That there was no negligence on the part of respondent-impleaded Jones Stevedoring Company which proximately, or to any degree, or at all caused or contributed to the said accident or injuries to said libellant.

II.

That respondent United States of America, a sovereign, has failed to sustain the burden of proof of the material allegations contained in the Petition to Bring in Third Party Under Rule No. 56.

III.

That impleaded-respondent Jones Stevedoring Company is not liable to libellant nor to respondent United States of America for the whole or any part of the said loss or damage.

IV.

That impleaded-respondent Jones Stevedoring Company, a corporation, is entitled to a decree of dismissal of the Petition of the United States of America to bring in Third Party Under Rule No. 56 and to have and recover its costs of suit herein, reserving however, the right of the United States, if any, to proceed against Jones Stevedoring Company for any amounts compensable under the Longshoremen's and Harbor Workers' Act, insurance policies herein referred to by reason of the waiver of subrogation agreement.

That a decree of dismissal be entered herein in favor of Jones Stevedoring Company, respondent-impleaded, and against the United States of America, a sovereign, on its causes of Petition to Bring in Third Party under Rule No. 56, exonerating said Jones Stevedoring Company from any liability under the contract for indemnity, and for its costs of suit herein.

V.

That the decree of dismissal entered herein in favor of Jones Stevedoring Company be without prejudice to the right of the United States, if any, to proceed against Jones Stevedoring Company for such amounts found to be compensable pursuant to

33 U.S.C.A. Section 914 to libelant by Jones Stevedoring Company as hereinabove set out.

Dated: April 10th, 1952.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Submitted by:

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Proctors for Jones
Stevedoring Company.

Receipt of copy acknowledged.

Lodged March 31, 1952.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on for hearing on the 17th, 18th, 19th, 20th, 21st, 24th and 25th days of March, 1952, and evidence both oral and documentary having been introduced, the libelant being represented by Herbert Resner and Raoul D. Magana, and the respondent United States of America being represented by Chauncey Tramutolo, United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General, and J. Stewart

Harrison, Attorney, Department of Justice, and respondent-impleaded Jones Stevedoring Company, a corporation, being represented by John H. Black and Edward R. Kay, and the respondent American Pacific Steamship Co., a corporation, being represented by Dorr, Cooper and Hayes and J. T. Cooper, having been heretofore dismissed as a party respondent, and after due deliberation, the Court makes its

Findings of Fact

I.

It is true that libelant Frank Luehr is and during all the times herein mentioned was a resident of the County of Alameda, State of California, and resident within the jurisdiction of the above-entitled Court.

II.

It is true that during all the times involved in this cause the respondent United States of America owned a certain tank ship known and designated as the USNS "Shawnee Trail," which vessel was operated by the respondent American Pacific Steamship Company pursuant to a contract between that company and United States of America, in interstate and foreign commerce.

III.

It is true that libelant brought and maintained the amended libel herein under the Suits in Admiralty Act (Act of March 9, 1920, c. 95 41 Stat. 325, 46 U.S.C. §§ 741-752), under the Public Vessels Act (Act of March 3, 1925, c. 428, 48 Stat. 112, 46 U.S.C. §§ 781-790), and the General Maritime Law.

IV.

It is true that on July 28, 1950, in the forenoon, the said USNS "Shawnee Trail" was docked at the port of Alameda, California, at Army Transit Depot No. 8, and was afloat on navigable waters of the United States.

V.

It is true that at all times mentioned in said amended libel respondent United States of America owned a certain barge and floating crane designated as Army Barge BD 3031, which barge and crane were then and there, and at all times material herein, operated, managed, maintained and controlled exclusively by United States of America, acting through the United States Army, its personnel and civilian employees.

VI.

It is true that at the times mentioned in said amended libel, libelant was in the employ of Jones Stevedoring Company as a longshoreman, and was then and there necessarily working aboard said USNS "Shawnee Trail" in the usual and customary scope and course of his employment.

VII.

It is true that at the times and places mentioned in said amended libel, libelant was working on the mecano deck of the said USNS "Shawnee Trail" helping to load a jet airplane aboard said vessel. It is true that said jet airplane was raised from a barge alongside said USNS "Shawnee Trail" by

said barge and floating crane BD 3031, carried over the deck of the said USNS "Shawnee Trail" by said derrick, and lowered to a point above the mecano deck of said USNS "Shawnee Trail." It is true that said plane had been stopped by respondent United States of America a distance of approximately three to six feet above said mecano deck. It is true that the operation of raising, carrying over, lowering and stopping said jet airplane, and of operating said crane, as found herein, was done solely and exclusively by respondent United States of America. It is true that at said time and place United States of America so negligently and carelessly managed, operated, maintained and controlled the aforesaid barge and floating crane BD 3031 that they did cause said jet airplane to fall from the hoist by which it was being loaded and it did fall upon the libelant, causing him grievous and severe personal injuries as hereinafter found.

VIII.

It is not true that at the time and place mentioned in the amended libel that the said USNS "Shawnee Trail" or the barge and floating crane BD 3031 were unseaworthy, but it is true that said barge and floating crane BD 3031 was carelessly and negligently operated and controlled by respondent United States of America and it is true that as a direct and proximate result of said negligence and carelessness a jet airplane was caused to and it did fall upon the libelant, crushing him and causing him grievous and severe personal injuries as hereinafter found.

IX.

It is true that the fact that libelant was working on the mecano deck did not in any way contribute to or cause the accident or injuries as found herein.

X.

It is not true that libelant's injuries were caused by any unseaworthiness of the said USNS "Shawnee Trail" or said barge and floating crane BD 3031, but it is true that as a sole, direct and proximate result of the exclusive negligence and carelessness of respondent United States of America a jet airplane was caused to and did fall upon libelant, and libelant thereby was caused to and did incur grievous and severe personal injuries as follows:

1. Compression fracture of the first lumbar vertebra, with marked displacement posteriorly, and anterior wedging.
2. Fracture of the neural arch of the first lumbar vertebra.
3. Fractures of several transverse processes and lamina of the vertebra.
4. Derangement of the lumbar-sacral joint, with a complete collapse of the fifth lumbar interspace.
5. Injury to several of the intervertebral discs in the lumbar spinal area.
6. Contusion of the spinal cord, and scar tissue in the cord.
7. A mesenteric thrombosis, resulting in a paralytic ilias, or paralysis of the bowel.

8. Thrombo phlebitis of both legs.
9. Oblique fracture of the left clavicle.
10. Fractures of at least six ribs and a tremendous concussion injury of the entire chest.
11. A compound comminuted fracture of the left tibia, with removal of the anterior cortex, and osteomyelitis.
12. Fractures of the left fibula at both the upper and lower ends.
13. Avulsion fracture of the right astragalus.

XI.

It is true that libelant was hospitalized for a period in excess of 100 days immediately following his injuries and that various life saving methods were employed in order to save his life, including blood transfusions, catheters in his bladder, rectal tubes and enemas, intravenous feeding, anti-biotics and other methods. It is true that libelant developed osteomyelitis of the left tibia which has required six surgical operations to date and various skin grafts and other treatment. It is true that libelant has been under the continuous treatment of a physician and surgeon from the time of said injury until the date hereof and is still undergoing active treatment.

It is true that libelant has suffered permanent injuries as follows:

1. Spinal injuries which will require surgical fusion of the spine, which may relieve libelant of

some future pain, but which will leave him with a permanent, serious and extensive spinal disability.

2. Spinal cord injury, resulting in scar tissue in spinal cord, which has left the spinal cord in a permanently damaged condition.

3. An active and still present osteomyelitis of the left tibia, which will require further surgical intervention and which osteomyelitis will remain as a permanent disability.

4. A portion of the anterior cortex of libelant's left tibia has been removed and libelant's left leg has been permanently shortened.

5. Traumatic arthritis of the left hip which will remain as a permanent disability.

6. Traumatic arthritis of the right ankle which will remain as a permanent disability.

7. A demineralization of the bones of the left hip, right ankle and left tibia.

8. Fractures of the left fibula which have not united and will not unite at the upper end and have united tenuously with overriding at the lower end.

All of the said injuries caused the libelant to suffer severe and excruciating pain, suffering, distress, humiliation and anxiety and have caused libelant to lose much sleep and rest. Said permanent injuries to libelant's spine, back, left hip, left leg and right ankle presently cause and will in the future cause libelant severe, extreme and excruciating pain, suffering, distress, anxiety and humila-

tion, and the operations which libelant will be forced to undergo in the future will cause him severe and extreme pain, suffering, worry, distress and anxiety.

It is true that libelant will be required to undergo active medical treatment for a period of approximately fifteen months after the date hereof and will have to be treated medically for the remainder of his life for said injuries.

It is true that libelant is permanently and completely disabled for any kind of physical labor, but may possibly at some uncertain future date be able to engage in some type of sedentary occupation, requiring his brain rather than his physique. Libelant is untrained and unqualified for any kind of work other than physical labor.

Libelant was born on March 11, 1899, and at the time hereof is 53 years of age, with a life expectancy of between 20 and 21 years.

XII.

It is true that libelant has incurred medical expenses on account of said injuries to the date hereof in the amount of \$7,322.32, which has been paid by his employer's compensation insurance carrier. It is true that libelant will be caused to incur expenses for medical, surgical and hospital treatment in the future and will require medical attention for the rest of his life.

XIII.

It is true that libelant was gainfully employed as a longshoreman at the time of the accident and was earning wages of approximately \$64.00 per week,

averaged over a period of 2½ years prior to his injury. It is true that from the time of libelant's injury on July 28, 1950, until the date hereof that the average weekly earnings of a longshoreman in the Port of San Francisco has amounted to approximately \$87.00 per week and had libelant not been injured and been able to work, it is true that he could have earned approximately the sum of \$7,500.00 during the period from his injury to date, and that compensation has been paid by libelant's employer in the amount of \$3,082.20 to date.

XIV.

It is true that all and singular the premises are within the Admiralty and Maritime jurisdiction of this Court.

XV.

It is true that as a result of the injuries sustained by libelant as found herein, and by virtue of his permanent disability, pain and suffering, and his general and special damages, the Court finds that he has suffered and been damaged in the total sum of \$125,000.

From the Above Findings of Fact, the Court Makes
Its Conclusions of Law:

I.

That the Court has jurisdiction of the parties and the subject matter by virtue of and pursuant to the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U.S.C. §§ 741-752), the Public Vessels Act (Act of March 3, 1925, c. 428, 43 Stat. 112,

46 U.S.C. §§ 731-790), and the General Maritime Law.

II.

That the libelant has met the burden of proof of all the material allegations contained in his amended libel.

III.

That the libelant is entitled to have and recover from respondent United States of America, a sovereign, the sum of \$125,000.00, as and for general and special damages, with interest thereon at 4% per annum from the date hereof, and costs of Court.

IV.

That a decree be entered herein in favor of libelant Frank Luehr and against respondent United States of America, a sovereign, in the sum of \$125,000.00, with interest thereon at the rate of 4% per annum from the date hereof, and costs of Court.

Let the decree be entered.

Dated: April 10th, 1952.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District
Court.

[Endorsed]: Filed April 10, 1952.

In the United States District Court, for the North-
ern District of California, Southern Division

In Admiralty No. 25833

FRANK LUEHR,

Libelant,

vs.

UNITED STATES OF AMERICA, AMERICAN
PACIFIC STEAMSHIP CO., a Corporation,

Respondents,

vs.

JONES STEVEDORING COMPANY a Corpo-
ration,

Respondent-Impleaded.

FINAL DECREE

(Re Jones Stevedoring Co.)

The above-entitled cause having come on regularly to be heard on the pleadings and proofs and having been submitted by the advocates of the respective parties, and after due deliberation having been had and Findings of Fact and Conclusions of Law having been duly settled and signed;

It Is Ordered, Adjudged and Decreed that respondent, United States of America, a sovereign, take nothing from respondent-impleaded Jones Stevedoring Company, a corporation, on its Petition to Bring in Third Party under Rule No. 56, and that said Petition to Bring in Third Party un-

der Rule No. 56 be and the same is hereby dismissed, reserving, however, the rights, if any, of the United States of America to proceed against Jones Stevedoring Company for any amounts compensable under the Longshoremen's and Harbor Workers' Act insurance policies by reason of the waiver of subrogation agreement.

It Is Further Ordered, Adjudged and Decreed that Jones Stevedoring Company, a corporation, have and recover from respondent United States of America the sum of \$362.00 as and for costs.

Dated: April 10th, 1952.

/s/ MICHAEL J. ROCHE,

Judge of the United States
District Court.

Lodged March 31, 1952.

[Endorsed]: Filed April 10, 1952.

Entered April 11, 1952.

In the United States District Court, for the North-
ern District of California, Southern Division

In Admiralty No. 25833

FRANK LUEHR,

Libelant,

vs.

UNITED STATES OF AMERICA, AMERICAN
PACIFIC STEAMSHIP CO., a Corporation,

Respondents,

vs.

JONES STEVEDORING COMPANY, a Corpo-
ration,

Respondent-Impleaded.

FINAL DECREE

(Re Frank Luehr)

The above-entitled cause having come on regu-
larly to be heard on the pleadings and proofs and
having been submitted by the advocates for the
respective parties, and after due deliberations hav-
ing been had and after Findings of Fact and Con-
clusions of Law having been duly settled and
signed;

It Is Ordered, Adjudged and Decreed that libel-
ant Frank Luehr have and recover general and
special damages, on his Amended Libel herein,
against respondent United States of America in
the sum of \$125,000.00, together with interest
thereon at the rate of 4% per annum from the date
hereof until paid.

It Is Further Ordered, Adjudged and Decreed that libelant recover his costs of Court herein in the sum of \$206.90.

Dated: 10th April, 1952.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Lodged March 28, 1952.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the respondent United States of America hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree made and entered herein on April 11, 1952, in favor of the above-named libelant, and from the final decree entered herein on April 11, 1952, dismissing respondent-impleaded Jones Stevedoring Company.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of Justice, Proctors for Re-
spondent United States of America.

Affidavits of service by mail attached.

[Endorsed]: Filed July 8, 1952.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

It appearing to the Court that due and timely application for appeal herein was made by respondent United States of America, by filing Notice of Appeal herein on July 8, 1952, the within appeal is hereby allowed.

Done in Open Court this 14th day of July, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

CITATION ON APPEAL

To Frank Luehr, Libelant, and to Herbert Resner, Esq., His Proctor, and to the Jones Stevedoring Company, a Corporation, Respondent-Impleaded, and to Messrs. Black and Kay, Its Proctors:

Whereas, the United States has lately appealed to the United States Court of Appeals for the Ninth Circuit from the entry of the decrees granting recovery as prayed by libelant, and denying indemnity against Jones Stevedoring Company, which decrees were entered in the District Court of the United States for the Northern District of Cali-

fornia, Southern Division, on the 11th day of April, 1952;

You Are, Therefore, Hereby Cited to appear before the said United States Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, California, at the next term of the Court, thirty days after the date of this citation to do and receive what may appertain to justice to be taken in the premises.

Given Under My Hand in the City and County of San Francisco, State of California, on the 14th day of July, 1952.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Affidavits of service by mail attached.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Ordered that the appellant United States of America may have to and including October 6, 1952, to file the Apostles on Appeal in the United States Court of Appeals for the Ninth Circuit.

Dated: July 14th, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]. Filed July 14, 1952.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The above-named respondent, United States of America, who is the petitioner and appellant herein, hereby assign errors in the proceedings, Findings of Fact, and Conclusions of Law, and Final Decree herein, as follows:

I.

The District Court erred in finding and holding that the injuries to the libelant were the sole, direct and proximate result of the exclusive negligence and carelessness of respondent, United States of America.

II.

The District Court erred in finding and holding that it is not true that any injuries sustained by the libelant were caused in whole and/or in part or at all by the carelessness and/or negligence of Jones Stevedoring Company in directing said libelant to stand under a swinging load in a precarious position several yards above the main deck of the vessel (and/or in failing to provide and/or request any decking and/or scaffolding and/or other safety appliances for the use of said libelant.)

III.

The District Court erred in finding and holding that the Derrick Barge BD 3031 was operated, manned, and controlled exclusively, to the exclusion of all others, by the United States of America

and that it is true that respondent-impleaded Jones Stevedoring Company had no direction or control of the use or management of said derrick barge.

IV.

The District Court erred in finding and holding that Jones Stevedoring Company did not direct libelant to stand under a swinging load in a precarious position several yards above the main deck of the vessel, and that it is not true that said injuries suffered by libelant or any of them were in any way caused in whole or in part by any act or negligence and/or carelessness upon the part of Jones Stevedoring Company, its employees, servants, or agents, and that it is true that all of the injuries suffered by libelant were caused solely and exclusively by the negligence of respondent, United States of America.

V.

The District Court erred in finding and holding that United States of America is liable for damages to libelant under the amended libel herein, and such liability was neither in whole or in part proximately, or at all, caused by or contributed to by the fault or negligence of Jones Stevedoring Company, its employees, agents, or servants, but said liability is exclusively that of United States of America, its exclusive negligence having been the sole and proximate cause of the accident and injuries to libelant herein.

VI.

The District Court erred in finding and holding that it is not true that Jones Stevedoring Company is obligated under the contract or otherwise, or at all, to respond to United States of America either by way of contribution or indemnity under said contract or otherwise, or at all, and that there is no liability on the part of Jones Stevedoring Company under the terms of said contract, or otherwise, or at all.

VII.

That the District Court erred in finding and holding that the issue of whether or not Jones Stevedoring Company and/or Fireman's Fund Insurance Company must reimburse the United States of America for such portion of the liability herein occasioned by cost of medical attention past and future, although argued and presented, is not properly determinable in this action.

VIII.

That the District Court erred in finding and holding that the issue of whether or not the Jones Stevedoring Company and/or Fireman's Fund Insurance Company must reimburse the United States for such portion of the liability herein founded on loss of earnings so far as compensable under the provisions of the Longshoremen's and Harbor Workers' Act and the contracts of insurance therein referred to, although argued and presented, is not properly determinable in this action.

IX.

That the District Court erred in failing to find

that the Jones Stevedoring Company and its compensation underwriters are liable to respondent, United States of America, for such portion of the judgment as is represented by cost of medical attention to libelant both past and future.

X.

That the District Court erred in failing to find that the Jones Stevedoring Company and its compensation underwriter are liable to the respondent, United States of America, for such portion of the judgment as is founded upon loss of earnings for which libelant's employer became liable under the provision of the Longshoremen's and Harbor Workers' Act and the contract of insurance herein referred to.

XI.

That the District Court erred in its Conclusions of Law in concluding that respondent United States of America was negligent, and its negligence was the sole proximate cause of the accident and resulting injuries to libelant.

XII.

The District Court erred in finding and holding that there was no negligence on the part of respondent-impleaded Jones Stevedoring Company which proximately, or to any degree, or at all caused or contributed to the said accident or injuries to said libelant.

XIII.

That the District Court erred in its Conclusions of Law in concluding that respondent, United

States of America, a sovereign, has failed to sustain the burden of proof of the material allegations contained in the Petition to Bring in Third Party Under Rule No. 56.

XIV.

That the District Court erred in its Conclusions of Law in concluding that impleaded-respondent Jones Stevedoring Company is not liable to libelant nor to respondent United States of America for the whole or any part of the said loss or damage.

XV.

That the District Court erred in its Conclusions of Law in concluding that impleaded-respondent Jones Stevedoring Company, a corporation, is entitled to a decree of dismissal of the Petition of the United States of America, to bring in Third Party Under Rule 56, and to recover its cost of suit herein.

XVI.

That the District Court erred in finding that it is true that from the time of libelant's injury on July 28, 1950, until the date hereof that the average weekly earnings of longshoremen in the Port of San Francisco has amounted to approximately \$87.00 a week and had libelant not been injured and been able to work, and in finding and concluding that libelant could have earned approximately the sum of \$7,500 during the period of his injury to date.

XVII.

That the District Court erred in finding and holding that as a result of the injuries sustained by libelant, and by virtue of his permanent disability, pain and suffering, and his general and special damages, that he has suffered and been damaged in the total sum of \$125,000.00.

XVIII.

That the District Court erred in failing to find that the amounts payable or paid by way of compensation and medical expenses should be credited to the judgment, against respondent, United States of America, by virtue of their having been paid or become payable by the compensation carrier which has expressly waived its rights against respondent, United States of America, as subrogee under Section 33 of the Longshoremen's and Harbor Workers' Act.

XIX.

That the District Court erred in failing to find that the judgment should be reduced by the amount of \$7,322.32 for medical expenses that have been paid by the libelant's employer's compensation carrier.

XX.

That the District Court erred in failing to find that the judgment should be reduced by the amount of \$3,082.20 representing payments voluntarily made by Jones Stevedoring Company's compensation carrier.

XXI.

That the District Court erred in failing to find that the judgment should be reduced by the estimated cost of future medical care, for which the libelant's employer's compensation carrier has become liable, and has expressly waived its rights against respondent, United States of America, as subrogee.

XXII.

That the District Court erred in failing to find that the judgment against the United States should be reduced in the amount of \$11,000.00 which is the maximum amount payable by the employer's compensation carrier for the permanent partial disability suffered by libelant, said compensation carrier having expressly waived its rights against respondent, United States of America, as subrogee.

XXIII.

That the District Court erred in its Conclusions of Law in concluding that libelant is entitled to have and recover from respondent, United States of America, a sovereign, the sum of \$125,000.00, as and for general and special damages, with interest thereon at the rate of 4% per annum from date of entry of the decree.

XXIV.

That the District Court erred in its decree in ordering that libelant take from the United States of America the sum of \$125,000.00 together with interest and costs thereon.

XXV.

That the District Court erred in failing to find separately the amount of damages awarded as special damages and the amount awarded as general damages.

XXVI.

That the District Court erred in its decree adjudging that the United States take nothing from respondent-impleaded Jones Stevedoring Company on its Petition to Bring in Third Party Under Rule 56, and in dismissing said petition.

XXVII.

That the District Court erred in failing to decree that the United States take from Jones Stevedoring Company full indemnity for any and all liability to libellant in the cause.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of Justice, Proctors for Re-
spondents, United States of America.

[Endorsed]: Filed September 19, 1952.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 25833

FRANK LUEHR,

Libelant,

vs.

THE UNITED STATES OF AMERICA,
AMERICAN PACIFIC STEAMSHIP CO.,
a Corporation,

Respondents,

vs.

JONES STEVEDORING COMPANY, a Cor-
poration,

Respondent-Impleaded.

Before: Hon. Michael J. Roche, Judge.

REPORTER'S TRANSCRIPT

Monday, March 17, 1952

Appearances:

For Libelant:

HERBERT RESNER, ESQ., and
RAOUL D. MAGANA, ESQ.

For Respondent U. S. A.:

STEWART HARRISON, ESQ., and
CARL E. LUNDIN,

Special Assistants to the United States
Attorney.

For Respondent-Impleaded Jones Stevedoring
Co.:

EDWARD R. KAY, ESQ., and
JOHN H. BLACK, ESQ.

March 17, 1952—10:00 A.M.

The Clerk: Frank Luehr, Libelant, vs. the United States of America and American Pacific Steamship Company, Respondents, vs. Jones Stevedoring Company, Respondent-Impleaded, for trial.

Mr. Resner: Ready, your Honor.

Mr. Harrison: Ready, your Honor.

Mr. Kay: Ready, your Honor.

The Court: You may proceed.

(Whereupon opening statements were made by counsel.)

The Court: Here are some young ladies with documents now. Maybe we can avoid them coming back if you want to call them.

Mr. Resner: Thank you, Judge.

The Court: If that is agreeable to everyone.

Mr. Kay: Yes, your Honor.

Mr. Resner: Will you come up here with the records?

Mr. Magana: May I address the witness, your Honor?

The Court: Surely.

Mr. Magana: Will you take the stand?

MARALYNN OSBORNE

called as a witness on behalf of the libelant, sworn.

The Clerk: State your full name to the [2*] Court.

A. Maralynn Osborne.

Direct Examination

By Mr. Magana:

Q. Miss Osborne, what is your position?

A. Medical record librarian, Merritt.

Q. Did you, in response to a subpoena, bring with you the records covering one Frank Luehr?

A. I did.

Q. And does that include all the X-rays, as well as the nurses' notes and hospital reports?

A. Yes, it does.

Q. Do you have them all, the X-rays, contained within one envelope? A. Yes.

Mr. Magana: May the X-rays, then, your Honor, be admitted as plaintiff's Exhibit No. 1?

The Court: May be admitted and marked.

The Clerk: Respondent's Exhibit 1 admitted and filed in evidence.

(Whereupon the X-rays above referred to were received in evidence and marked Libelant's Exhibit No. 1.)

Mr. Magana: You have in addition with you an envelope containing what, the hospital records, as well as the nurses' notes? A. That is right.

Q. I notice you have another envelope there. [3]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Maralynn Osborne.)

A. That has nothing to do with this case.

Q. Excuse me; thank you.

Mr. Magana: May the envelope then containing the hospital records and nurses' notes be marked as Libelant's Exhibit No. 2?

The Court: May be admitted and marked.

(Thereupon the envelope above referred to was received in evidence and marked Libelant's Exhibit No. 2.)

The Court: Any questions, gentlemen?

Mr. Harrison: None, your Honor.

The Witness: May I have three separate receipts on those, for the three papers?

The Court: The Clerk will give you a receipt. Anything of this young lady?

(Witness excused.)

MASAKO ABE

called as a witness on behalf of the libelant, sworn.

The Court: What is your full name?

The Witness: Masako Abe.

The Court: Will you spell that for the Reporter?

The Witness: M-a-s-a-k-o A-b-e.

The Court: And what is your business or occupation?

The Witness: Medical record librarian.

The Court: Where? [4]

The Witness: The Alameda Hospital.

The Court: How long have you been so engaged?

(Testimony of Masako Abe.)

The Witness: Six years.

The Court: What is that?

The Witness: Six years.

The Court: Six years. Proceed.

Direct Examination

By Mr. Magana:

Q. Miss Abe, did you bring with you in response to a subpoena all of the records covering the admission of one Frank Luehr since July 28th?

A. Yes.

Q. 1950? A. Yes.

Q. Do you have with you all the X-rays that were taken there at the Alameda Hospital?

A. Yes.

Mr. Magana: May the X-ray records then, be marked as Libelant's Exhibit No. 3 next in order, your Honor?

The Court: May be admitted and marked.

The Clerk: Libelant's Exhibit 3 in evidence.

(Whereupon the X-rays above referred to were received in evidence and marked Libelant's Exhibit No. 3.)

Q. (By Mr. Magana): You have, in addition thereto, I notice, three separate envelopes.

A. Yes, three. [5]

Q. All right. Do those cover different dates of admission? A. No, it is all one admission.

Q. And do they cover the same features, or are the nurses' notes and matters of that sort kept separate?

(Testimony of Masako Abe.)

A. The nurses' notes are in two parts.

Q. All right. Would you just draw one of the envelopes, please, the top one, and what is that?

A. This is the nurses', part of the nurses' notes.

Q. All right.

Mr. Magana: May that be marked as Libelant's Exhibit No. 4, next?

The Court: May be admitted and marked.

Q. (By Mr. Magana): Would you then indicate the next envelope?

The Clerk: Libelant's Exhibit 4 admitted and filed in evidence.

(Whereupon the envelope above referred to was received in evidence and marked Libelant's Exhibit No. 4.)

A. This is the nurses' notes, part two.

Mr. Magana: May that be admitted in evidence as Libelant's Exhibit No. 5?

The Court: May be admitted next in order.

The Clerk: Libelant's Exhibit 5 admitted and filed in evidence.

(Whereupon the nurses' notes above referred to were [6] received in evidence and marked Libelant's Exhibit No. 5.)

Q. (By Mr. Magana): The final envelope?

A. Yes. This is the third part of the nurses' notes.

Mr. Magana: May that be admitted in evidence as Libelant's Exhibit 6?

The Court: May be admitted next in order.

(Testimony of Masako Abe.)

The Clerk: Libelant's Exhibit 6 admitted and filed in evidence.

(Whereupon the nurses' notes referred to above were received in evidence and marked Libelant's Exhibit No. 6.)

Q. (By Mr. Magana): I think you have another envelope—does that—

A. No, this is the receipt.

Mr. Magana: Thank you, very much.

The Court: Any questions?

Mr. Harrison: No questions.

The Court: You may step down.

(Witness excused.)

The Court: We will take an adjournment until 2 o'clock.

(Thereupon a recess was taken to the hour of 2 o'clock p.m. this date.) [7]

Afternoon Session, Monday, March 17th,
1952, 2:00 P.M.

The Court: Proceed.

Mr. Resner: We will call Mr. Ted Spirz, your Honor.

Mr. Kay: Pardon me, Mr. Resner, and your Honor; we have this model here that has just been finished in time for the testimony, fortunately, and I would like to, out of order, and I am sure these gentlemen will stipulate, to present the model man

here simply to identify that and let us offer it in evidence. May we do that?

The Court: No objection.

Mr. Resner: No objection.

Mr. Harrison: No objection.

JAMES B. WATERS

called as a witness on behalf of respondent-im-pleaded Jones, being first duly sworn, testified as follows:

The Clerk: State your full name to the Court.

A. James B. Waters.

Direct Examination

By Mr. Kay:

Q. Mr. Waters, what is your occupation?

A. Pattern maker and model maker.

Q. How long have you been engaged in that work? A. Oh, about fifty years.

Q. Fifty years? [8] A. Yes.

Q. For whom are you working?

A. American Pattern Company.

Q. You had occasion——

The Court: Who is the American Pattern Com-pany?

A. Down at George Suber's, 6th and Bryant.

The Court: How long have you been in that business?

A. Oh, been in it since the first World War.

The Court: All right.

(Testimony of James B. Waters.)

Q. (By Mr. Kay): Mr. Waters, you had occasion to build that model that is resting over there of that section of the mechano deck on a tanker; is that correct? A. Yes, sir.

Q. You did that pursuant to my directions; is that correct? A. Yes, sir.

Q. And I gave you some information in the nature of a photograph purporting to be photographs of the Shawnee Trail, that is, that portion of that particular vessel, is that right?

A. That is right.

Q. And also blueprints from which you took certain measurements so that you could build that to scale; is that correct? A. To scale, yes.

Q. Is that what you did in this case?

A. Yes. [9]

Mr. Kay: I think that is all.

Mr. Harrison: I have one question, your Honor.

Cross-Examination

By Mr. Harrison:

Q. Were the blueprints of the Shawnee Trail?

Mr. Kay: No. Let me say this—I should have indicated that—we weren't able to get blueprints of the Shawnee Trail but we did get them of her sister ship, and I am sure if you want to look into it further, Mr. Harrison, you will find that is correct. We were careful about that.

Q. (By Mr. Harrison): Do you remember any of the dimensions, Mr. Waters? A. Yes.

(Testimony of James B. Waters.)

Q. How high is the top of the fore and aft cross beams from the top deck?

A. Seven feet and——

The Court: Step down here and show us.

(Witness went to model.)

Mr. Harrison: My question, your Honor, pertains to the distance between the top of one of these fore and aft beams to the deck of the vessel.

A. It was seven feet, two inches.

Q. From where is that measurement taken?

A. From the deck to the top of the girder.

Q. Isn't it correct a tanker has a camber to the deck and [10] it would be less space from here to here on the inboard side than on the outboard side?

Mr. Kay: We will stipulate to that. I think that is a fair statement.

Q. (By Mr. Harrison): Do you know how much camber there is on a tanker?

A. No, I do not.

Mr. Harrison: Well, perhaps we can get that.

Mr. Kay: Yes, we will stipulate to that. That is correct.

Mr. Harrison: That is all.

Mr. Kay: What is the scale?

A. One inch to the foot.

Mr. Kay: Your Honor, we would like to introduce that as respondent's exhibit.

The Court: No objection?

Mr. Harrison: No objection.

Mr. Resner: No objection.

(Testimony of James B. Waters.)

The Court: Let it be admitted and marked.

(Model referred to was admitted into evidence as respondent-impleaded Jones' Exhibit A-1.)

(Witness excused.)

Mr. Resner: We will now call Mr. Ted Spirz, your Honor. [11]

TED SPIRZ

called as a witness on behalf of the libelant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Ted Spirz, walking boss, Jones Stevedoring Company.

Direct Examination

By Mr. Resner:

Q. Where do you live?

A. 54 Langton, San Francisco.

Q. What is your age? A. Pardon me?

Q. Your age? A. Thirty-seven.

Q. How long have you been a longshore walking boss?
A. Approximately eight years.

Q. How long have you been in the longshore trade?

A. Since the latter part of '29, with the exception of two years. I went back to school, then I came back to school, then I came back to the front.

Q. Now, just what are the duties of a walking

(Testimony of Ted Spirz.)

boss in the longshore industry, generally speaking?

A. Well, he is in charge of the longshoremen and the gangs to see that they do their—well, I tell them where to put their cargoes, how to do it, and if it isn't correct, correct them and order them around. I am in charge of loading the vessel or discharging. [12]

Q. I direct your attention to July the 28th of the year 1950. Do you recall that day, Mr. Spirz?

A. Yes, I do.

Q. Was that the day Mr. Luehr, the libelant in this case, was injured? A. That is correct.

Q. On that day you were employed by what concern? A. Jones Construction Company.

Q. Did you witness this accident? A. Yes.

Q. Would you please explain to his Honor, Judge Roche, the operation that was in progress just before the accident happened?

A. Well, we were loading airplanes—these were jets—with a heavy lift barge. The heavy lift barge was offshore and there was another floating barge alongside that had the airplanes. The heavy lift barge would pick up the airplanes from the barge, put it up over the deck, and that happened to be at the inshore side, so he would come across practically the whole deck, lower away, and then we would get hold of the airplane. I would tell the whistle man where I wanted the plane, and if it had to be moved a little bit one way or the other he would move it to where I would want it.

Then when he got exactly over the spot where we

(Testimony of Ted Spirz.)

wanted, we would fix the fore and aft moveable beams just [13] exactly so, and then the platform would have to be exactly so, then I would tell him everything was in order and he would land the plane and then he would go on to the next plane.

Q. Mr. Spirz, this offshore crane, floating barge, you say there was an operator on that rig?

A. There is an operator, yes.

Q. On that rig? A. Yes.

Q. By whom was that operator employed?

A. By the army, I presume. It is an army barge. A civil service.

Q. You mentioned a whistle man?

A. Well, he is in charge of the whole barge. The whistle man is in charge. He has control of the whole barge. It is his barge. The operator takes orders from him.

Q. Who employs the whistle man?

A. He is a civil service man, too.

Q. Employed by the army?

A. By the army, so far as I know.

Q. Does this plane—strike that, please. Does this barge with these planes on it come up alongside the vessel you are about to load?

A. Yes. The barge comes from Sacramento, from McClellan Field up there; comes down and they bring it alongside the [14] Shawnee Trail and it was tied up alongside the Shawnee Trail and the heavy lift barge is tied up there, and they pick it up off the barge and bring it on the deck.

Q. Who has direction over that operation of

(Testimony of Ted Spirz.)

picking the plane up from the barge, heavy lift barge, and bringing it over to the Shawnee Trail?

A. The whistle man. The man in charge of the heavy lift barge.

Q. The army whistle man? A. Yes.

Q. Up until that point do the longshoremen have anything to do with the operation?

A. We have what they call the truck men and a jitney driver, and if there isn't sufficient help on the barge they will secure the bridle to the plane. They will secure the tag lines to the plane, and they would help hold onto the tag lines as the heavy lift barge would pick it up. But they had no other orders but to do that.

Q. Did they have any participation in the actual lifting and the moving of the plane from the barge onto the vessel?

A. No, they have nothing to do with that whatsoever. They just secure the bridle and make the tag lines secured onto the stand of the landing gear.

Q. Whose exclusive job would it be, then, to pick up the planes off the barge and move them over and land them on the [15] vessel, the Shawnee Trail?

Mr. Harrison: I object to that as calling for a conclusion of the witness as to whose job it was exclusively. I think he can testify as to who did what part. Control of the operation is not within the knowledge of the witness.

Mr. Resner: I will withdraw the question and ask:

Q. I will ask you whether or not any longshore-

(Testimony of Ted Spirz.)

man had anything to do with actual lifting of the plane and moving of it over the deck and lowering of it onto the Shawnee Trail?

A. Absolutely not.

Q. Who does that? A. The whistle man.

Q. And who else?

A. The operator operates the crane, but the whistle men give him the orders. If the whistle man didn't give him the orders, he wouldn't do anything. He waited for the signal.

Q. The crane operator——

A. Waited for orders.

Q. From the whistle man? A. Correct.

Q. Then the barge operator would pick up the plane, move it over and lower it on signals from the whistle man? A. Correct.

Q. I am going to show you a photograph, Mr. Spirz, and ask you to look at it and identify it for His Honor. [16]

A. That is a mechano deck on a tanker.

The Court: That is what?

A. A mechano deck on a tanker. This is the tanker (indicating). This is the main deck and this is the mechano part of the deck on the outboard side—on both sides. This structure here is all mechano.

Mr. Resner: The witness is pointing to the beams constructed over the main deck and the moveable beams, your Honor, as the mechano structure or the mechano deck.

Q. (By Mr. Resner): Can you tell which way you are looking in that picture, Mr. Spirz?

(Testimony of Ted Spirz.)

A. Yes, we are looking from the forward end to the bridge.

Q. You are looking from the bow to the midship house, to the bridge? A. Correct.

Q. The port side, then, would be on the right hand side of the picture?

A. Right hand side of the picture, yes, sir.

Q. Starboard side would be on the left or to the dock side here? A. Correct.

Q. I point to an object in the center of the picture. What is that? A. That is the mast.

Q. That is the mast? [17] A. Correct.

Q. Do you see the catwalk there?

A. Right here on the right hand side of the picture, of the mast (indicating).

Q. Extending right up the center on the right hand side in the lower part of the picture to the house?

A. This is not exactly the center. The mast is in the center, approximately, but the catwalk is a little——

Q. A little to one side? A. Yes, sir.

Q. Does that fairly represent the mechano structure of the Shawnee Trail as it appeared on the day of the accident? A. Yes.

Mr. Resner: I might tell your Honor, this appears to be a picture of the Shawnee Trail taken at Wilmington, California, by Will Hayes on December 7, 1951. I will offer this photograph as libelant's next exhibit, if I may.

(Testimony of Ted Spirz.)

The Court: No objection?

Mr. Harrison: No objection.

Mr. Kay: No objection.

The Court: Let it be admitted and marked.

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 7.)

Q. (By Mr. Resner): Mr. Spirz, there is the model, respondent-impleaded Jones' Exhibit A-1. Can you tell us what portion [18] of the vessel, as it appears from the picture, is represented by the model, Mr. Spirz?

A. That is the port side of the mechano deck, and that is the house where the bridge is, and that is the ladder—if you notice, Judge, that is the ladder right there (indicating) coming down to the main deck. This part here is part of the bridge.

Q. (By Mr. Resner): I am going to ask you, Mr. Spirz, to draw an area line about that portion of the deck of the vessel which corresponds generally to the model section?

A. (Drawing). Take it right along here and up to the house.

Q. All right.

Mr. Resner: I will mark it, then.

Q. (By Mr. Resner): Would that be it?

A. That will be it.

Mr. Resner: I will mark that "S-1."

Q. (By Mr. Resner): Now, I want to show you some other photographs, Mr. Spirz, and ask you to tell us if you recognize them and what they represent?

A. That is a heavy lift barge.

Q. The barge in question in this accident?

(Testimony of Ted Spirz.)

A. I wouldn't know if that would be the barge in question, but that is the same.

Q. The same?

Mr. Resner: I might ask you, Mr. Harrison, we can [19] stipulate that this series of photographs which I now want to show Mr. Spirz are army barge B.D.-3031, which is the barge in question, and which pictures were taken by agreement between all the parties by the army photographer?

Mr. Harrison: That is correct. We all went out there and had the pictures taken.

Mr. Resner: All right, I will then ask that these various pictures be marked, if your Honor please. The first one shows the side view of the barge itself with the cabin.

Q. (By Mr. Resner): That is the cabin, Mr. Spirz?

A. Yes, sir.

Q. And this is the——

A. Boom.

Q. Boom?

A. Correct.

Q. It sits on the water alongside the ship?

A. Yes.

Mr. Resner: May this be received as libelant's next exhibit?

The Court: It may be admitted and marked.

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 8.)

Q. (By Mr. Resner): I show you a further photograph which shows B.D.-3031. Is that another view of the same vessel?

A. It is a view of a barge that the army has. [20]

(Testimony of Ted Spirz.)

Q. Looking in what direction, Mr. Spirz?

A. That is the boom this way (indicating).

Q. We are looking aft? We are standing on the bow of the barge? There is a boom coming up?

A. This is the forward portion.

Q. This is the forward portion of the barge?

A. Of the heavy lift barge.

Q. You see a house?

A. That is the cabin.

Q. That is the cabin up there in the upper left hand part of the picture where the operator is located?

A. Yes, that is where the operator is.

Q. Therefore we are looking aft in this picture?

A. Yes, we are looking aft in the picture.

Mr. Resner: May it be received?

The Court: Yes.

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 9.)

Q. (By Mr. Resner): I show you another picture and ask you what that is?

A. This picture is the boom—heavy lift purchase hook and the small left purchase hook, and when we load airplanes we use this smaller hook. This is the extra heavy lift.

Q. On the day in question this particular plane that you were loading was being held by which hook? [21]

A. The small hook.

Q. The small hook? Do you want to draw a circle around that, Mr. Spirz? I will mark this

(Testimony of Ted Spirz.)

“S-1” and ask that this picture be received in evidence as libelant’s Exhibit next in order.

The Court: It will be admitted and marked.

(Photograph referred to was admitted into evidence and marked libelant’s Exhibit No. 10.)

Q. (By Mr. Resner): That is another photograph, Mr. Spirz, showing the name plate of the vessel itself—the barge itself, I should say, is that right?

A. Well, I wouldn’t know about the name plate. I mean I never did see it on the barge, and though I had a lot of contact with the barge, I wouldn’t know if it had it on the barge or not.

Mr. Resner: This may be received as libelant’s exhibit next in order?

Mr. Harrison: No objection.

Mr. Kay: No objection.

The Court: Let it be admitted and marked.

(Photograph referred to was admitted into evidence as libelant’s Exhibit No. 11.)

Q. (By Mr. Resner): Now, Mr. Spirz, I show you another photograph and ask you to tell us what that represents?

A. I have never been in the cabin of this vessel, the barge, [22] in my life, but I presume that is what it is.

Q. The cabin? A. Of the heavy lift barge.

Mr. Resner: I think we can stipulate, Mr. Harrison, that is what it is?

(Testimony of Ted Spirz.)

Mr. Harrison: Yes.

Mr. Resner: We went up and sat in the seat ourselves, Judge. I offer this as libelant's Exhibit next in order.

The Court: It may be admitted and marked.

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 12.)

Q. (By Mr. Resner): This photograph I hand you now, that depicts what?

A. Those are levers. I presume they are in the cabin of the heavy lift barge, though I never was in the cabin myself.

Mr. Resner: I might indicate to your Honor, you can see in this picture the lever to the left marked "auxiliary hoist" and one "main hoist," and another on the right is marked "boom hoist."

The Court: What does the evidence show in relation to the contact?

Mr. Resner: The auxiliary hoist, the one on the left in the photograph. May this be received as libelant's exhibit next in order?

The Court: No objection? It may be received and marked. [23]

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 13.)

Q. (By Mr. Resner): I am going to ask you, Mr. Spirz, to tell us what time of day this accident occurred?

A. Approximately around 11:30.

Q. 11:30?

A. Yes, sir.

(Testimony of Ted Spirz.)

Q. In the morning?

A. Yes, 11:30 in the morning.

Q. Where were you stationed when the accident happened?

A. I was on the catwalk.

Q. The catwalk of the tanker, Shawnee Trail?

A. That is correct.

Q. Can you go down to the model there and point out to Judge Roche just where you were standing at the time of the accident?

(Witness left the witness stand and went to the model.)

Mr. Resner: We need a pointer.

A. I was standing approximately right about here. I was watching the plane. Well, I was right on the right hand side of the nose looking beyond it. I was standing right about there (indicating).

Q. You were looking inshore?

A. Yes.

Mr. Resner: If I had a ruler I could approximately picture the place. [24]

Q. We could do it by——

Mr. Kay: I have a ruler here.

Mr. Resner: You do have?

The Witness: I was standing approximately right—33 inches—approximately right here (indicating).

Q. That would put you 33 feet forward of the midship house?

A. Approximately would.

Q. And somewhere between the thwartship beams, if we use No. 1 beam closest to the midship house, that would be Beam 1, Beam 2, forward,

(Testimony of Ted Spirz.)

Beam 3, Beam 4 and Beam 5, and Beam 6, being six beams on the model, 1 being the beam closest to the midship house, that would put you somewhere between Beams 3 and 4? A. Correct.

Q. On the catwalk looking port?

A. Correct, looking inshore, portside.

Q. All right. Was someone there with you on the catwalk?

A. I remember Mr. Rosenstock on the catwalk, and the whistleman Charlie. He was on the catwalk, and probably one or two stevedores, but I can't recollect who.

Q. Who is Mr. Rosenstock?

A. Why, he is in charge of the airplanes for the Army Air Corps, so far as I know. I don't really know his title, but he is in charge of all the airplanes, responsible.

Q. Did you see the plane coming over the ship?

A. Yes, sir. [25]

Q. Would you please describe to Judge Roche just what you observed as the plane was picked up on the barge and brought over the ship just prior to the attempt to land it?

A. Well, this is the inshore side of the vessel, so then you have the starboard side, and you have the heavy lift barges here.

Q. Water point. A. Into the water side.

Q. Pointing to the water side? A. Correct.

Q. That would be the starboard side?

A. Correct.

Q. Starboard side to the water?

(Testimony of Ted Spirz.)

A. Correct. And the heavy lift barge picked up the plane and he has to go quite high, as the house is here, and he brings it over the house, and the house fore and aft, whatever they consider, and we have tag lines, and we try to keep the plane steady from swinging, so that it won't hit a guy or stay or any portion of something on the house, and comes over and he gets it directly over on the inshore side.

Q. What height would he bring it over, Mr. Spirz?

A. I couldn't say exactly what height. I would say around 40 feet, 35 feet.

Q. High? A. Really up quite high. [26]

Q. All right.

A. Then when he gets it over on the inshore side he lowers away, the whistle man in charge, he will lower away, and if he is close to anything his job is to stop or what, and he comes down very slowly.

Q. Go ahead.

A. And he brings it down until within our reach, where we can hang onto it and hold it and he blows his whistle.

Q. Let me ask you this: What kind of signals does this whistle man, Charlie, give to the man on the barge, do you know any of the signals?

A. I know a few of the common ones, some of the others that I wouldn't swear to, but like——

Q. Which ones do you know?

A. I know the ones like picking up a load he will blow once, once to stop at any time regardless

(Testimony of Ted Spirz.)

whether the lift barge hoist is up or down, it will always blow once; to lower will always blow twice. Other signals to stop, for lowering, for swing it, really I wouldn't know those, but I do know the common ones.

Q. What were you and Mr. Rosenstock doing on the catwalk?

A. Why, we—my job is to see that the tag lines are being held by my men and seeing that they are holding them the right way so the plane will not swing, and watching it, and directing my men, and then when you get over by these stays, [27] when you work inshore you still have to get your tag lines over them, and that is why the plane comes in so slowly, get the tag lines over, hold on to the tag lines and help get it down.

Q. Do you go through the stays?

A. No, past, over the stays.

Q. All right. What does Mr. Rosenstock have to do with that particular operation at that point?

A. He has nothing to do but just observe.

Q. I see. Well, now, does he tell you where to spot the planes?

A. Yes, he has a plan and we get it prepared, we get it ready before the plane comes in.

Q. Is that plan one developed by the Army?

A. Well, I think Mr. Rosenstock developed the plans.

Q. He is with the Army?

A. He is with the Army Air Corps, yes, sir.

Q. Now, Mr. Spirz, there are a couple of little

(Testimony of Ted Spirz.)

blocks here—your Honor, see them—what are these blocks used for?

A. Those are what we call a platform.

The Court: What?

The Witness: A platform.

The Court: A platform.

The Witness: That is for the landing gear where the wheel is, they have a tripod stand instead of the wheel, and [28] those are already on the plane on the barge when they bring it down, and we land, we put these platforms on these movable fore and aft beams.

Q. Could you describe to the Judge just what you do with them?

A. Well, you should have three, because you have three landing wheels, have one for the nose, up in here (indicating) there is a beam that is stationary that stays here and one stays here (indicating).

Q. Then that would be parallel to the catwalk?

A. Fore and aft. That is for the nose and wheel stand, we have one there and then we have two others for the rear two wheels, and on Mr. Rosenstock's plan he gives an idea just where those wheels will be.

The Court: Those are adjustable? Are they adjustable or when are they put on there?

The Witness: I don't understand.

Q. (By Mr. Resner): The Court says when are they put on?

The Court: When you are lowering the plane?

(Testimony of Ted Spirz.)

The Witness: The stand on the—no, these platforms are put on these movable beams.

The Court: Yes.

The Witness: And when the plane is in the right place.

The Court: Yes.

The Witness: Then if the stand of the wheel is here we [29] move the platform over.

The Court: They are adjustable?

The Witness: Yes, they are just a regular stand two men can handle.

The Court: All right.

The Witness: You can move it back and forth.

Q. (By Mr. Resner): And all the beams also adjustable so that they are moved to receive the planes in the proper place?

A. Oh, yes, just like this shows, that is just how they are. You can move them back and forth, but if you kick one harder than the other you have to straighten it out, and they are movable.

Now, the object is, you have to try and get as close as you can before the plane comes aboard the ship where this platform should be. So we get the plane where we can handle it and we move it to where we want it.

Then everything stops and we see where our platforms are. If they aren't right, we get under the plane and we have to move these movable beams just right—we have to put this platform exactly under that stand of the wheel. We have to be careful because we have to drill a hole on this, outside of

(Testimony of Ted Spirz.)

the beam, and another one on the inside, and on this side also, so after the plane is landed we have a carpenter come alongside that will drill a hole and put a U-bolt.

The Court: For the purpose of locking it? [30]

The Witness: To secure it, a regular iron U-bolt that comes up that takes washers and a screw and ties that platform down.

Q. (By Mr. Resner): That is secured around a movable beam into the wooden platform?

A. Into the wooden platform.

Q. And the plane is secured to these, three of these wooden platforms? A. Correct.

Q. The nose and the place where the two wheels are? A. Correct.

Q. Now, where are the longshoremen stationed during this loading operation of planes, Mr. Spirz?

A. Well, every plane that we land on the mechano deck is a little different and every operation the men will be in a different place. We have a few men down on the main deck to pass up these platforms.

Q. Pass up the platforms to the men?

A. Pass up the platforms to the men above to put on the movable beams. There may be one or two men on the catwalk, if the plane is ready to be hoisted, have them on the offshore side standing by waiting for the tag lines, and then as they get the tag lines they have to follow the plane and watch the plane.

(Testimony of Ted Spirz.)

Q. All right. And then there are some on the deck who hand up the little wooden platforms, hand them up to men on the [31] mechano deck?

A. That is correct.

Q. And there are certain men required to work on the mechano structure?

A. No, it is not necessary for certain men, it is just wherever they are at. If a man is on the mechano deck and the plane is being hoisted, he automatically will stop what he is doing and come over and be ready for the airplane.

Q. What I had in mind, does this operation entail some men working on the deck and some men up on top of the structure?

A. That is correct.

Q. What is the job of the men on top of the structure, that is, on the beams?

A. Their job is to take care of the tag lines, if they have any tag lines when the plane gets within reach and it is stopped, their job is to hold on to the plane to keep it from swinging, moving, just to steady it.

Q. All right.

The Court: You mentioned "tag lines" a number of times. They have to do with guiding on the plane?

The Witness: The tag lines?

The Court: What are they?

The Witness: They are very long lines, they are light, and attached to the stays of the airplane. When the heavy lift barge picks up the plane from

(Testimony of Ted Spirz.)

the barge the tag lines are [32] held out, control the plane from swinging.

The Court: That is what I am talking about.

The Witness: Yes. And we have to keep those lines, tag lines, taut so the plane doesn't swing into anything.

Q. Are those tag lines also used when the plane is brought down when he gets above the spot where you are going to land it?

A. They are then of no more use.

Q. You do use it for awhile and the plane comes down?

A. While it comes down until the plane is within reach.

Q. When the plane is within reach, then what happens?

A. Then the tag lines are forgotten, either the men will go to the wheel and he will take the tag line off and just let it go, and hang onto the wheel structure.

Q. Now, does this operation require the men to get their hands upon the plane physically?

A. When the plane is down close to the mechano deck and they can reach the landing gear, then that is what they do, they go over and grab ahold of the landing gear to keep control of the plane.

Q. And they do that for what purpose, Mr. Spirz?

A. So the plane will not swing and hit anything.

Q. And so that you can land it——

(Testimony of Ted Spirz.)

A. You have to hold on to it to land it exactly on this platform. [33]

Q. On the platforms? A. Yes, sir.

Q. Now, is the plane stopped at some point before the men take over with their hands?

A. Well, it is up 30 feet, the operator might stop it three or four times, or he might have it come all the way down until it is up to us to grab hold of it.

Q. And then is it stopped at that point before the men grab hold of it? A. Oh, yes.

Q. Now, did you see Mr. Luehr right before this accident?

A. Well, yes, when I was standing here (indicating).

Q. You said here, on the catwalk, you have indicated on the catwalk?

A. Yes, and the plane was coming over, all tag lines were taken care of, I looked inshore when I saw Mr. Leuhr standing over here by the stays, and we waited for the plane to come down, and when the plane stopped and we were ready to take over and hold onto it, I saw Mr. Luehr coming over and grab hold of that, the left rear landing strut stand, I presume that is what it was, that is where he was.

Q. Was he in a place where he was supposed to be, Mr. Spirz? A. Yes.

Q. That was his job there?

A. That is his job, to hold onto the plane and steady it. [34]

Q. Was he doing what he was required to do at

(Testimony of Ted Spirz.)

that particular time? A. That is correct.

Q. Now, I want you to tell his Honor in your own words as you stood on the catwalk just what you saw happen.

A. Well, when the plane stopped, Mr. Rosenstock and Charlie, the whistleman, three of us there, I had my hand on the nose of the plane, I always want to know when it stops moving, and Rosenstock and I agreed we should move it over a little bit more towards the house.

Q. That would be aft?

A. That would bring it aft. So Charlie was waiting for us, either I told Charlie or Mr. Rosenstock told Charlie, "Well, bring it over a little more," and Charlie said, "Okay," and he walked up this way for the reason this wing was close to the house and he was walking this way (indicating).

Q. When you say this way—

A. I mean—

Q. On the catwalk aft toward the house?

A. Toward the house. And he gave a signal, and he gave his whistles, and he stopped. And that is when all of a sudden the plane just dropped, and I had my hand on the nose, it just dropped while I was walking inboard, and I knew Mr. Luehr was over there and I actually saw what I think is the wing of the plane hit his left shoulder, ride him down, [35] and his head went down and his glasses flew straight out, up and out, and over he went and he landed on the main deck.

(Testimony of Ted Spirz.)

Q. Could you tell us with what speed the plane dropped?

A. Well, the only way I can describe is if you just cut the two falls, if you just cut the falls that was it, it just let go.

Q. Dropped like the falls?

A. Just dropped like, you know, the fall.

Q. Did the plane rest where it fell, or did it bounce or move?

A. The—when the plane hit, when it hit it hit with the fuselage, the belly of the fuselage, and it hit and it bounced.

Q. It hit the—

A. It hit the mechano deck and it actually bounced, and I would say, and I think it bounced a foot.

Q. Bounced back up?

A. Bounced and came back again.

Q. And then did you see, could you then see Mr. Luehr?

A. Yes, I saw Mr. Leuhr when the wing went down, and he was hit so hard that he fell over and he fell onto the main deck and right over here. He fell, he was possibly right in here (indicating).

Q. You have indicated a place approximately—

A. Right in here somewheres (indicating).

Q. Approximately the place, oh, perhaps 12 feet or so forward of the midship house on the port side? [36]

(Testimony of Ted Spirz.)

A. A little further, and I ran over this way, this here (indicating).

Q. "This way," meaning toward the house?

A. I ran aft towards the house and down the catwalk of the house here, and down the ladder, and I noticed when Mr. Luehr was laying in there, and his leg was twisted, I knew it was broke, how bad I didn't know, so I grabbed the upper part of his thigh, went down slowly and when I touched the bone that was protruding, just held his leg as straight as I could, and a couple of stevedores—he was complaining of pain, and he was in very great pain. I asked them to hold him steady and got—I asked someone to get a cot or something, and the Captain came and he gave Mr. Luehr a shot in the arm.

Then the ambulance driver arrived and they took over and he asked me to go to the hospital with them, and I did.

Q. You drove to the hospital?

A. I went in the ambulance with Mr. Luehr.

Q. You want to take the stand again for a minute, Mr. Spirz? You came back to the job somewhat later?

A. Yes, approximately an hour and fifteen minutes, or an hour and a half later. In Alameda they have a police car, police ambulance, and the officer was very kind enough to drive me back.

Q. Now, Mr. Spirz, I want to show you another photograph and ask you if you recognize that? [37]

(Testimony of Ted Spirz.)

A. Yes, that is the fuselage part of the plane that we loaded on the Shawnee Trail.

Q. And that is the fuselage that fell on Mr. Luehr?

A. That is the same type of a plane.

Mr. Resner: I am going to ask that this be marked first, and then I want your Honor to see it.

The Court: Admitted and marked next in order.

The Clerk: Libelant's Exhibit 14 admitted and filed in evidence.

(Thereupon the photograph above referred to was received in evidence and marked Libelant's Exhibit No. 14.)

Q. (By Mr. Resner): That is the fuselage that fell on Mr. Luehr? A. Correct.

Q. Let me show it to your Honor.

Those beams in the picture are similar, are they, Mr. Spirz, to the model over there showing the beams and the mechano structure?

A. That's correct.

Q. How heavy is that fuselage which fell on Mr. Luehr?

A. Well, we have loaded different jets and different gas engines—I think they even have the weight on this fuselage, but I don't remember now.

Q. Do you recall approximately what it was?

A. I couldn't really say what the approximate weight is, I [38] wouldn't like to, I might be too far off, so I wouldn't really—

Q. All right, Mr. Spirz. Now when you came

(Testimony of Ted Spirz.)

back to the job after taking Mr. Luehr to the hospital, did you meet the whistle man and the barge man? A. Yes, I did.

Q. Where was it that you met them?

A. I met them on the dock. They were coming up from the water right towards the office that we used, and I met them on the dock.

The Court: Met who?

Mr. Resner: The whistle man and the crane operator.

Q. That is the man operating the crane——

A. Operating the crane.

Q. ——which dropped the plane?

A. Yes, and the——

Q. And Charlie, the man who gave him the whistle signals? A. Correct.

Q. Now, where was this job taking place, by the way, that was what place?

A. At Alameda, they call it, I think, ID 3.

Q. Was anyone else present there when you encountered these two men on the dock?

A. I think Mr. Rosenstock was there, and I encountered them on the dock.

Q. Did you gentlemen have a discussion there?

A. Yes, I asked the whistle man and the operator what happened, [39] and the operator spoke up and he says, he says, "I made a mistake; it is my fault." He says, "It was hot in the cab and I wanted to open the window, and as I did so my coveralls, my sleeve, caught the friction release and opened it

(Testimony of Ted Spirz.)

wide open, and before I could get it back, why, the damage was done.”

Mr. Resner: Your witness, counsel.

Cross-Examination

By Mr. Harrison:

Q. You stated you had been connected with stevedoring since how long, since 1929?

A. The latter part of 1929.

Q. The latter of '29, with the exception of two years?

A. Correct.

Q. How long have you been a walking boss?

A. Eight years.

Q. Eight years. How many—can you give us an estimate of how many tankers with mechano decks you have loaded in the course of your career?

A. Well, in the course of World War II, through there and up to this Korean issue, I'd say a couple dozen—24, 20.

Q. During the loading of these ships I understand you to say you direct your men where to work, do you not?

A. Correct.

Q. No one else directs them or gives them any orders at all?

A. Well, the gang boss can tell them what to do. [40]

Q. Was there a gang boss on this job?

A. Yes, there was.

Q. What was his name?

A. His first name is Martin, I don't recall—

(Testimony of Ted Spirz.)

Q. Ingelbretson?

A. It could be, I couldn't recall.

Q. Do you know of your own knowledge, or can you give us an estimate, Mr. Spirz, of how high it is from the top of those, one of those fore and aft beams to the main deck of this vessel?

A. The movable fore and aft beam?

Q. Yes.

A. Approximately 7 feet, 7 foot 2 inches, 7 foot 6 inches, around that distance.

Q. Now, how wide is one of the fore and aft beams? A. Six inches.

Q. How wide is an athwartship beam?

A. Ten inches.

Q. Ten inches. Can you tell me, Mr. Spirz, you say that the men on the main deck handed these platforms up to the men on the mechano deck. Who built those platforms, do you know?

A. Mr. Rosenstock ordered them through the Army to have them to be built, they were built by the Army.

Q. Were they built on or around them?

A. No, they were built, I presume, in the Oakland Army base [41] and brought to Alameda, Army Base at ID3.

Q. I see. Now, referring again to these tag lines, these tag lines are not on the airplanes when they come down the river from Sacramento, are they?

A. No, sir.

Q. And you say that one of your stevedore men or two of your stevedore men put the tag lines on

(Testimony of Ted Spirz.)

the planes as they came out of the barge, is that correct?

A. Sometimes they did, and sometimes they didn't. We had some men from up in McClellan field I call "doctoring." In other words, any plastic that was off the plane, they had to do any mechanical work to the fuselage, these men from Sacramento, who were qualified for it, they did that work, and sometimes they did all the hooking on and put the tag lines on. If they didn't have enough help, I sent my dock man out there to help.

Q. Do you recall whether or not any of your own dock men did do this?

A. I think they were——

Q. You think there were some of your own men, employees of Jones, out on the barge?

A. There could have been.

Q. Now, when the plane has been raised and begins to come over the deck of the vessel, where do the men stand when they handle these tag [42] lines?

A. Well, they have to go to the offshore side of the vessel first on the mechano deck, or maybe one on the catwalk, but you have to get over to the offshore side to get the tag line from the heavy lift barge from the men on the barge, they keep it taut, and as the plane comes over the ship, then the tag lines—so then the men will reach out and grab the tag lines and take over.

Q. Now, do they stand on the mechano deck to do this? A. They do.

(Testimony of Ted Spirz.)

Q. You mean they reach out over from the top of the mechano deck over the side of the vessel to receive one of these tag lines?

A. They've done that, they reach out from the edge of the mechano deck and grab the tag line.

The Court: How, reach it from the catwalk?

The Witness: I mean there would be a stevedore at the catwalk waiting to help as the plane came over. That is the fore and aft stays.

Q. (By Mr. Harrison): Now, why don't you stand on the main deck and guide these tag lines in?

A. Because it is impossible to guide these tag lines, those movable beams, fore and aft beams would stop you.

Q. Wouldn't it be possible to pass them over each beam as you came to them?

A. Then you would slacken off your tag line and then you [43] wouldn't know what happened to your plane.

Q. It would be impossible to keep this on the tag line and still pass it over those beams?

A. That's correct.

Q. Mr. Spirz, is it proper stevedoring practice for men to stand or work beneath a suspended load?

A. Are you talking about a load of airplanes?

Q. I am talking about general stevedoring practice.

Mr. Kay: Just a moment. Your Honor, I am going to object to that as incompetent, irrelevant and immaterial. That is just the point, we are not concerned with certain types of loads, concerned

(Testimony of Ted Spirz.)

with an airplane, and proper, customary practice as to that is the proper question.

The Court: General practice wouldn't help us bring us to the scene of this and the physical outline.

Mr. Harrison: I was trying to get to what this man considers a safe practice, your Honor.

The Court: Under the circumstances existing.

Q. (By Mr. Harrison): Let us ask you this question, then, Mr. Spirz: When assisting to steady-ing a sling load, such as one of these airplanes, either in hoisting it or landing it, is it a good safety practice to allow men to stand in the line of travel of that load?

A. It depends on how high the load is.

Q. Well—— [44]

A. If you give me a distance I can help.

Q. Would you say it was proper to allow a man to stand under a suspended load ten feet above his head?

A. No, because he couldn't control the airplane, he couldn't reach it. If he can reach, when he can reach the plane, then it is permissible to get under it.

Q. Now, when it reaches the uppermost part of your reach, is it proper for him to stand underneath the load to help steady it?

A. Well, he doesn't go underneath the load, then when it gets within a reasonable reach, where he can go out and reach that landing gear or that tripod, then he has to go underneath that ring and

(Testimony of Ted Spirz.)

he is partially under that plane, yes, he has to do that.

Q. And you consider that a good safety practice to allow a man to stand either in the travel of the load or underneath the load?

A. It is not whether you think it is good practice or not, you can't land that plane unless you get under it.

Q. You think that is a dangerous practice?

Mr. Kay: Just a moment. Your Honor, I object to that as incompetent, irrelevant and immaterial. That is relative to whether or not all stevedoring is dangerous, to a certain extent, and improper to ask this witness that question.

Q. (By Mr. Harrison): You think it is comparatively dangerous? [45]

Mr. Kay: Same objection, your Honor.

The Court: I will allow him to answer.

The Witness: In which way are you referring, the work being dangerous?

Q. (By Mr. Harrison): What you term a necessity of men standing underneath a suspended swingload or in the line of travel of a load?

A. You mentioned suspended; you mentioned swinging——

Mr. Kay: Your Honor, again that is a compound question, getting away from the question that he asked to which I objected.

Mr. Harrison: I asked the man if it was dangerous for one to stand underneath a load when it is suspended. I will ask again:

(Testimony of Ted Spirz.)

Q. Is it dangerous?

Mr. Kay: Just a moment.

The Court: He has outlined a situation here, the necessity, whether it is dangerous or not, in order to land the plane, get it in place, the man has to get under it, and that is dangerous.

The Witness: That is correct.

Q. (By Mr. Harrison): That is correct?

A. Yes.

Q. The way you consider it is necessary to lower these planes, you also consider it dangerous, is that correct? [46]

A. I consider it dangerous to a certain extent if the load falls, you're under it, you have to get under it to land that plane, have to be underneath it, have to hold that tripod and three stands, and under that plane, hold on to the tripod, and it is suspended, if something happens, you are under it, and that is it. [47] But you can't land that plane by standing ten feet away. You have to hold on to that stand.

Q. Let us get to what you think is dangerous, Mr. Spirz. Would you say it is a good safety practice to allow, say, a man to stand next to an open hatch near a suspended load?

Mr. Kay: Just a moment, your Honor. I object to that as entirely incompetent, irrelevant and immaterial, has nothing to do with the direct examination, improper cross-examination. In the first place, he wasn't produced here as a safety expert, to be sure he has worked at the business, knows about

(Testimony of Ted Spirz.)

those things, but even in that regard this question is so far from the issues here he is talking about an entirely different thing.

Mr. Harrison: Your Honor, please, this man has testified he has been eight years a walking boss, four years as a stevedore, and I think it is very relevant in this case to determine what this man considers a safe practice and how he carries on his operations. Now, I am asking him a very simple question, whether or not he would consider it a safe practice to allow a man to stand next to an open hatch when there is a swinging load——

Mr. Kay: Just a moment, your Honor.

Mr. Harrison: I will be able to tie this up by comparing it to an open hatch to one of these mechano decks.

Mr. Kay: Then he should ask him about this mechano deck, [48] that is what we are concerned with here. That is going around to the back door.

Mr. Harrison: Your Honor, please, I wish to conduct an analogy to the practices which were carried on here and specific practices which are covered by the stevedores' own safety code.

The Court: I see what you are trying to get at, but we have no hatch here.

Mr. Harrison: I agree with that, your Honor.

The Court: Open hatch.

Mr. Harrison: I was intending to ask the witness if this doesn't present the same or comparatively dangerous condition as an open hatch would.

The Court: Ask him the direct question; he is an expert.

(Testimony of Ted Spirz.)

Mr. Harrison: All right.

Q. Mr. Spirz, I will repeat the question. Would you say it was good safety practice to allow men to stand near an open hatch near a suspended load?

Mr. Kay: Pardon me, our objection is noted to that?

The Court: The record will note the objection.

A. Now, you are talking about an open hatch. What type of a load are you talking about?

Q. (By Mr. Harrison): Well, let us say we are bringing aboard a deck load of cranes, airplanes, anything, and there happens to be an open hatch on that deck, you are intending to [49] land the deck load on the main deck of the vessel, would it be a safe practice to allow a man to stand between the travel of that load and an open hatch?

A. It is a safety rule, if you are going to land a load on the deck, you have to cover up the hatch, so you won't have an open hatch if you are going to put it on the deck.

Q. That would be a very unsafe thing to do, the safety rule prohibits it?

A. I just stated that you would have to close the hatch.

Mr. Resner: I am going to object to this, completely irrelevant, and not proper cross-examination. It has no relationship to this case.

The Court: I tried to indicate the conditions existing. The question you suggested to the witness here—I was liberal enough—but the conditions that

(Testimony of Ted Spirz.)

you recited has no relation to our problem here, as I take it.

Mr. Harrison: Well, I will drop that line of questioning. I thought it would be quite easy to compare the danger a man is exposed to standing next to an open hatch, and the danger he is exposed to while standing on one of these beams.

The Court: No relation to the conditions existing here thus far, unless we run into a hatch that is open, or something. I say that kindly and advisedly.

Q. (By Mr. Harrison): Mr. Spirz, as a walking boss of a stevedoring gang, is it one of your duties to look after the [50] safety of your men?

A. Yes.

Q. Now, would you agree that walking around on a six-inch movable beam some eight feet above the main deck of a vessel and swing a load is a comparatively dangerous operation?

Mr. Kay: Just a moment, your Honor. Again, there is no evidence and there hasn't been by this witness, and I don't suppose we are even going to get that kind of evidence with this thing, that there was any swinging load at all. I object on that ground.

Q. (By Mr. Harrison): Was the load landed, Mr. Spirz, at the time this accident happened?

A. Was the airplane landed?

Q. Yes. A. No, sir.

Q. Was it swinging? A. No, sir.

(Testimony of Ted Spirz.)

Q. Was it suspended by a single hook on a bridle?

A. It was suspended by a purchase hook that has two parts. What I mean by two parts, the fall went from the standing part of the boom down through the shiv and up, there was two parts on that hook which we, in stevedore terms, call two parts.

Q. I see. [51]

A. And it was suspended in the air.

Q. It was suspended? A. Yes.

Q. Why was it necessary for the men to have their hands on it?

A. To steady it from swinging.

Q. Then it would have swung if they did not have their hands on it?

A. It will swing if the wind hits it, or if the heavy lift barge moves or shifts. When ships go through the estuary the movement of the vessel, it will tend to make that plane swing, so we hold on to that tripod or that landing gear strut to steady that plane so nothing, the wings especially, won't hit any part of the ship.

Q. I see. Now, I will rephrase the question. Would you agree that walking around on a six-inch wide movable beam eight, seven to eight feet above the main deck of the vessel in the vicinity of a load which has a tendency to swing is a comparatively dangerous operation?

Mr. Kay: Your Honor, I am going to object, and I don't like to keep doing this—here is my

(Testimony of Ted Spirz.)

point: The evidence here is not that anybody was walking around, and as a result of that—or not even going to be evidence to that effect as a result of walking on a six-inch beam this man was injured. This man was standing on the beams there, not the [52] six-inch beams, your Honor, that is a ten-inch beam and standing in that position, and he wasn't walking, so this question would be improper, incompetent, irrelevant and immaterial.

Mr. Harrison: I will change the question, "walking" to "standing" to suit you, Mr.—

Mr. Kay: And on a ten-inch beam.

Mr. Harrison: Mr. Spirz has testified they are eight inches.

The Witness: Pardon me, you misunderstood me. The movable beams are six inches, the athwartship beams, they are firm and secured, are ten inches.

Q. Ten inches? A. Yes. [53]

Mr. Harrison: Well, I would still like to get an answer to this question, if the Court please:

Q. (By Mr. Harrison): Do you believe that standing on an eight-inch beam, seven to eight feet above the main deck of a vessel in the vicinity of a load which has a tendency to swing is a comparatively dangerous operation?

Mr. Kay: I object on the ground there is no evidence, won't be any evidence, this was an eight-inch beam.

Mr. Harrison: Ten-inch, pardon me.

(Testimony of Ted Spirz.)

Q. (By Mr. Harrison): With that amendment can you answer the question?

A. That is a ten-inch beam you are talking about?

Q. That is right.

A. The job—to load that plane you have to get under it. There is no other way.

Q. I am asking you—I am admitting that that is the way you did the operation. Do you think it was a dangerous operation?

A. Well, I have been under that plane—those planes, many times, and if I thought it was that dangerous I think I would refuse the job, so I would say it isn't a dangerous job. But that job has to be done that way. There is no other way. You have to get underneath the plane to hold the tripod to land it. If I thought it was dangerous—I am under it myself—I would not take the job. I would refuse [54] it.

Q. You don't think it is dangerous at all?

A. To some extent. There is danger in any stevedore work.

Q. Isn't there danger of falling?

A. From the rig?

Q. Yes.

A. Not for any of my men. I never made a report on any of my men.

Q. I am asking you if there isn't danger of falling?

A. Is there any danger of falling off of it?

Q. Yes.

(Testimony of Ted Spirz.)

A. There is danger in anything that a person might fall off of, yes.

Q. You don't know exactly how heavy those planes are, do you? A. Not exactly.

Q. But they are over a ton?

A. I am quite sure they are over a ton.

Q. You don't think with a weight as heavy as a plane, which has a tendency to swing, could very well knock one of the men off?

A. No, it isn't that dangerous.

Q. You don't think an airplane swinging on a hook will strike a man, may knock him off a ten-inch beam?

A. I am holding onto the strut, the landing gear of the [55] plane, myself. This will stand a very good gust of wind. I have done that. It isn't much to hold that fuselage, doesn't take much effort, but you have to hold onto that tripod and steady that plane. You don't need that here. It won't swing that far, knock a man over. It wouldn't never do that.

The Court: Take a recess for a few minutes.

(Short recess.)

Mr. Resner: Judge, Mr. Harrison has very kindly consented to allow me to withdraw Mr. Spirz for a minute or two and put on Mr. Paul of the Longshore Labor Relations for the purpose of proving the amount of port hours that were available during the period of Mr. Leuhr's disability.

The Court: Very well.

(Testimony of Ted Spirz.)

Mr. Harrison: I suggest you obtain Mr. Kay's consent, too.

Mr. Resner: Will you agree, Mr. Kay?

Mr. Kay: Absolutely.

Mr. Resner: Will you, Mr. Cooper?

Mr. Cooper: I didn't understand what you are asking.

Mr. Resner: Just to withdraw Mr. Spirz long enough to put on Mr. Paul, who is a member of the port Labor Relations, to prove the port hours during the period of Mr. Leuhr's disability.

Mr. Cooper: All right. [56]

(Witness excused.)

LESTER RICHARD PAUL

called as a witness for the libelant, sworn.

The Clerk: State your full name to the Court.

A. Lester Richard Paul.

Direct Examination

By Mr. Resner:

Q. Mr. Paul, state your name, please.

A. Lester Richard Paul.

Q. Your address?

A. 470 Vermont Avenue, Berkeley.

Q. Your occupation?

A. I would be considered a statistician down there.

Q. Who is your employer?

A. The Labor Relations Committee, or the Pa-

(Testimony of Lester Richard Paul.)

cific Maritime Association and Local 10 of the I.L.W.U.

Q. Pacific Maritime Association and the Longshoremen's Local— A. That is right.

Q. —Union Local 10, San Francisco?

A. That is right.

Q. You are the chief clerk?

A. That's right.

Q. What does your job entail, Mr. Paul?

A. Well, it entails the keeping of statistics, of the hours [57] worked by gangs.

Q. Directing your attention to the period commencing on July 31st, 1950, and continuing through to December 31st of 1951, during that period of time how was the work apportioned between the longshoremen in the port?

A. Well, the hours are set weekly, or were set weekly during that period by the Labor Relations Committee. In other words, they generally decide about how many—about how much work was going to be performed in the port.

The Court: How are they able to find that?

A. They went by the previous work of previous weeks. In other words, they would—say a forty-hour week, they would estimate that would be the amount of work that would be available; then in the event there is a week of work—an increase of work, say, about Monday or Tuesday, they would decide on an extension and allow ten hours more for the work.

Q. (By Mr. Resner): In that way were the

(Testimony of Lester Richard Paul.)

hours fairly apportioned between the longshoremen during that period of time?

A. Yes. We found that over a period of a year, why, it generally equalized out generally according to their estimate.

The Court: Do you have any difficulty at all serving both of those?

A. No, I don't think I do.

The Court: You are the first gentleman that has appeared [58] here that didn't have some difficulty down on the waterfront.

A. I am supposed to be neutral.

The Court: That is the reason I asked. You are supposed to be neutral. Keeping in mind the human element, I thought you had some job there. I didn't know. That is the reason I asked.

Mr. Resner: They have apportioned the work, Judge, as you know, during these years.

Q. (By Mr. Resner): Mr. Paul, you appear here pursuant to subpoena? A. Yes.

Q. That required you to produce certain information? A. Yes, sir.

Q. Did you bring that information with you?

A. Yes, sir.

Q. Will you bring it out? Have you got that in your pocket there? A. Yes.

Q. You have handed me some records here.

Mr. Resner: Mr. Harrison, and Mr. Kay and Mr. Cooper, do you gentlemen want to look at those? (Handing documents to counsel.)

Q. (By Mr. Resner): Those are from the offi-

(Testimony of Lester Richard Paul.)

cial records of the Longshore Labor Relations Committee for the years 1950 and 1951? [59]

A. Yes.

Q. Showing hours available and the rates of pay, is that right, Mr. Paul? A. Yes, sir.

Q. From what period of time to what other period of time does what you call the port year run?

A. Well, according to the time sheets I have submitted, why, the dates are as shown.

The Court: Subject to any correction that may be made, is there any objection, gentlemen?

Mr. Kay: I have no objection, your Honor.

Mr. Resner: Do you, Mr. Harrison?

Mr. Harrison: You aren't going to admit that in evidence?

Mr. Resner: I am going to offer in evidence, not the originals, but exact copies thereof, of the port hours for the period August 1st, 1950, to December 23rd, 1951, your Honor, and the rates of pay for those periods as taken from the official records.

Mr. Harrison: We will definitely object to that, your Honor. The hours that were available have absolutely no relationship to how many hours this particular man, Mr. Leuhr, would have worked.

Mr. Resner: He would have earned more.

Mr. Harrison: His past record is probably the best indication of his earning ability and his working habits. [60] I assume Mr. Leuhr is going to take the stand. We can determine from them his past earnings. The earnings in the industry have absolutely no relation to what Mr. Leuhr may or

(Testimony of Lester Richard Paul.)

may not have done had this injury not occurred. It is entirely too speculative and I submit it isn't proper.

Mr. Resner: The trouble with Mr. Harrison's argument or objection is that it does not apply to this industry, Judge, because a longshoreman is entitled to work all the hours that are available. The work is distributed amongst them, and Mr. Leuhr will testify that for a year or two or three before his accident he worked all the time that was available to him to work.

But it shows, nonetheless, your Honor, that in the twenty months he has now been disabled he had available to him an equal work opportunity with every other man on this waterfront. And I know of no better way for him to prove his wages, your Honor, during the twenty months than to show how to determine exactly within a few dollars, of what his fellow workers have earned; and as an indication, further, your Honor, of what the earnings are in that industry projected into the future of his life expectancy, which will, of course, be a vital element of damages.

Mr. Harrison: Your Honor, please, if Mr. Resner would produce the same records covering the war period, wherein I assume even greater hours were worked, and compare those to [61] Mr. Leuhr's actual earnings, then we would probably have no objection. However, now there is no relationship between hours available and Mr. Leuhr's actual earnings.

(Testimony of Lester Richard Paul.)

We suggest as a matter of argument, your Honor, that there were more hours available during the periods when Mr. Leuhr was able to be employed, and we have his earning record at that time, and the earning record must be compared with the hours available during that period.

The Court: Why couldn't the Court consider both?

Mr. Harrison: I believe with consideration of both of those things it would probably be proper, your Honor. But I suggest if Mr. Resner wants to produce this witness, he might produce the whole story.

The Court: Objection overruled. Proceed.

Mr. Resner: All right, Judge.

Q. (By Mr. Resner): I will show you, then, Mr. Paul, work records which have been brought up here, and ask you if they are exact copies of official records showing the port hours available and the rates of pay during the periods of time I have questioned you concerning?

A. Yes, that is the official records.

Mr. Resner: If your Honor please, I am going to offer these into evidence as one exhibit, if I may. There are three sheets of paper. One of them is a carbon copy.

(Official records referred to were admitted into evidence [62] as libelant's Exhibit No. 15.)

Q. (By Mr. Resner): Now, so that when you are gone, Mr. Paul, his Honor and all the lawyers

(Testimony of Lester Richard Paul.)

here will be able to understand this, I want to go over this.

The Court: Is there any way of giving it briefly in a digest form?

Mr. Resner: It is on here, but I want to indicate what they are—what the red and black figures are.

The Court: Very well.

Q. (By Mr. Resner): On each little square is a figure in black. What does that indicate?

A. That is the port hours for the week.

Q. And we see a figure in red in some of the squares. That indicates what?

A. That is an extension of port hours. In other words, if the work opportunity is greater than the hours specified we add it onto the port hours. In other words, an extension of hours.

Q. The line at the bottom—

A. Will be totals.

Q. Will be totals? A. Totals.

Q. So each figure at the bottom here on the left-hand side of the column will be totals?

A. Yes, that is the totals. [63]

Q. And the first sheet is for the year 1950?

A. That is right.

Q. The back of that sheet is for the year—

A. Continuation. Ran through up until the end of the period of the year.

Q. Which occurred when?

A. In this case here, December 24th for the year 1950.

(Testimony of Lester Richard Paul.)

Q. 1950? A. Yes.

Q. Then we have the second sheet here?

A. That starts out with beginning of the 25th of December.

Q. And it runs through until?

A. Until December 23, inclusive.

Q. Of 1951? A. 1951, that's right.

Q. Now, the rate of pay in the latter part of 1950 is shown here to be what?

A. Shown here on this original sheet as of the 30th of September, the rate changed.

Q. Well, so that we will understand, the rate of pay from September 30th—no, December 6th, 1948—

A. September.

Q. September 30th, 1950, was \$1.82 an hour?

A. For the straight time.

Q. For the straight time. \$2.73— [64]

A. \$2.73. Those are the Pacific longshore rates.

Q. On top of those there are certain penalty rates, five cents or ten cents an hour?

A. Some get ten cents more an hour.

The Court: Penalty for what?

Mr. Resner: Noxious cargo: Bombs, dynamite, explosives, acids.

Q. (By Mr. Resner): I see here, Mr. Paul, that the rate changed again at what date?

A. On September 30th.

Q. 1950, changed to \$1.92 straight time and \$2.48—

A. Eighty-eight cents overtime. \$2.88.

Q. The rate changed again?

(Testimony of Lester Richard Paul.)

A. The rate changed again on June 18, 1951.

Q. And when to \$1.97? A. That's right.

Q. Straight time. \$2.95 was overtime?

A. That is right.

Q. And that is the current rate of pay?

A. That is the current rate of pay.

Q. And you have on the right-hand side of the first sheet, for the period August 1, 1950, to October 1st, 1950, there were 470 port hours at \$1.82, totalling earnings on the port hour basis of \$855.40 for that period? A. That is right. [65]

Q. Then for the period October 2nd, 1950, to June 18, 1951, there were 1,600 port hours at a rate of pay of \$1.92 an hour, making total earnings for port hours \$3,072? A. That is right.

Q. Then June 18th, 1951, to December 23rd, 1951, there were 1,240 port hours at \$1.97 per hour, meaning port hour earnings in the amount of \$2,442.80? A. That's right.

Q. Now, since December 23rd, 1951, what are the systems whereby the work is made available to the men?

A. Well, they have a "low man out" system.

The Court: A what?

A. "Low man out." In other words, if a man is low in hours, he is sent out on that basis. He will have priority against the man who is high. The low man out will go first. He has priority.

Q. (By Mr. Resner): In other words, if there is a man, say, has fifty hours of work and another

(Testimony of Lester Richard Paul.)

man has thirty, the man who has thirty can work until he catches up with the man who has fifty?

A. They file each individual's there, the hours that they have worked the previous week when they start out a new week.

The Court: Tell me, who makes that determination?

A. The man himself. He knows what he has worked the previous week. [66]

The Court: That is a record?

A. That is a record, and each man signs that record.

Q. (By Mr. Resner): Since December, 1951, and for the past three and a half or four months, Mr. Paul, can you tell us what the average earnings of longshoremen have been?

A. I couldn't say definitely.

The Court: Approximately.

A. An approximate figure, just of all the figures that have gone through my mind, I would say the average longshoreman is earning around \$100 a week.

Mr. Resner: I think that is all, Mr. Paul.

Cross-Examination

By Mr. Harrison:

Q. Just a second here, Mr. Paul. Did you keep records similar to those for the year 1948?

A. 1948? Let's see, there was a period in there—I have forgotten just when—when we didn't record the port hours, but I have kept all the port hours ever since they started.

(Testimony of Lester Richard Paul.)

Q. Then you have a similar record to that, but one covering the year 1948?

A. Yes, I have the records. Whether during that period we kept them I don't know definitely. I would have to find out. Whatever it was, I have the records, yes.

Q. Do you have records covering 1949?

A. All the port hours that have ever been kept I have a record of regardless of the year. [67]

Mr. Harrison: Your Honor, please, we would like to have those records produced.

Mr. Resner: All you have to do is issue a subpoena, Mr. Harrison.

Mr. Harrison: I thought perhaps Mr. Paul would agree to bring the records, to save time. I think they are necessary.

Mr. Resner: We have no objection.

A. They are identically the same as these records. We kept them the same way, whatever were kept, I would have that.

Q. (By Mr. Harrison): Will you bring those tomorrow, Mr. Paul? A. Yes, sir.

Q. And a record of what Mr. Leuhr was making at the time he was injured?

A. No, I haven't any record of that. There was a time when we kept the individual records of hours only.

Q. You can't give me an estimate of what Mr. Leuhr himself was making at the time he was injured? A. No.

Mr. Harrison: I think that is all.

(Testimony of Lester Richard Paul.)

Mr. Resner: Then if you will, bring them tomorrow morning, will you, please, Mr. Paul?

A. Yes.

Mr. Resner: Do you want anything else?

Mr. Harrison: 1948 and 1949. If you have any individual [68] records on Mr. Leuhr we would like to have them.

Mr. Resner: What period?

Mr. Harrison: 1948, 1949, 1950.

A. No, I haven't any individual—

Mr. Harrison: After 1950?

A. No.

Mr. Resner: All right, thank you, Mr. Paul. We will see you tomorrow.

(Witness excused.) [69]

Mr. Harrison: Will you call Mr. Spirz for further cross-examination?

Mr. Resner: Yes.

(Mr. Spirz, recalled as a witness for the libelant, resumed the stand.)

TED SPIRZ

Cross-Examination

(Continued)

By Mr. Harrison:

Q. I think we finally agreed, Mr. Spirz, that this operation which we have described was, had inherent dangers in it?

(Testimony of Ted Spirz.)

A. Well, all stevedoring work has their danger points. Just what do you mean by danger?

Q. Well, possibility of injury.

A. In all stevedoring work there is possibility of injury.

Q. Would you say that working on this mechano deck had more possibility of injury than working on the main deck? A. I would say that.

Q. Then it is a comparatively dangerous operation as compared with other operations of stevedoring?

A. I don't—we handle steel, and I'd say that is more dangerous than a mechano deck any day.

Q. But this is more dangerous than, say, loading bags of coffee into the hold?

A. That is correct.

Q. Or just loading ordinary deck cargo? [70]

A. Correct.

Q. It is more dangerous than that?

A. Correct.

Q. Now, recognizing that this is a situation which would have, as we say, some dangers which are a little out of the ordinary, anyway, wouldn't you agree to that it is a little more dangerous than an ordinary stevedoring—

Mr. Kay: Your Honor, I object to that, he has asked and it has been answered, and quite effectively, I think, for everybody's benefit.

The Court: Well, you just got through with coffee, getting under coffee. There is a degree of danger in an activity of this kind that would be

(Testimony of Ted Spirz.)

hard to make a determination. It would be remote even as far as the law is concerned, if I have any conception of the problem.

Mr. Harrison: However, I think that we can, just in looking at that structure, see it would be more dangerous to try to load cargo in this situation.

The Court: If you were a longshoreman, if you didn't like to go on that, if your job was at stake, that is the other side of it.

Mr. Harrison: That is true, your Honor, but your Honor's very observation would lead us to believe that there would be a possibility maybe a longshoreman would object to working on top of that structure. [71]

The Court: Did you know of any?

The Witness: No one refused to work on the top of the mechano deck that I know of. Every man that came on the job, they never refused, they never even mentioned it.

Q. (By Mr. Harrison): Well, in all stevedoring operations aren't there some required safety precautions?

A. Yes, it depends on the type of cargo.

Q. Well, what safety precautions did you take to avoid injury to these men?

A. Only safety precautions I take is when the plane is up 30, 40 feet, not necessary to stay underneath, and you have your tag lines, either forward or aft, until the plane gets down, until you have to get right at the level, reach, and you have to get it,

(Testimony of Ted Spirz.)

and have to hold on to the plane, then you go under the plane.

Q. But you say that you prefer not to allow the men to stand under it until it has been reached?

A. That is correct.

Q. Why don't you allow them?

A. Because it isn't necessary. Why jeopard—should anybody go under a load they don't have to.

Q. What you started to say, is why jeopardize the men, is that correct?

A. Yes. If I saw a man walking on the catwalk as the plane was coming and it wasn't necessary for them to be there, I [72] would tell them to get out of there.

Q. Standing under a load does jeopardize a man?

A. It does when it is not necessary. If it is necessary to get under a load, then there is nothing you can do about it.

The Court: The distinction here is the necessity of getting under it.

Mr. Harrison: I am going to get to that, your Honor.

The Court: Pardon me.

Mr. Harrison: That is not the case.

The Court: Well, all right. I am only following his testimony, trying to; that is all I am trying to do.

Q. (By Mr. Harrison): The only safety precaution then you took was not allowing the men to

(Testimony of Ted Spirz.)

stand under a load while suspended 30 feet in the air?

Mr. Resner: That I object to as assuming something not in evidence, that isn't what the witness testified to, Judge.

Q. (By Mr. Harrison): What was your testimony as to the question what safety precautions did you take to avoid injury to these men during this operation?

A. Well, on all the mechano decks I have loaded I have had no accident up until this one, and I took precautionary measures when they came up. I just can't recall what precautionary measure I should take now. If you have a man doing something wrong you have to explain it. Thus a man has to jeopardize himself and I would have to see him jeopardize himself. If he [73] wants to do a toe dance on the mechano deck, I would stop him, anything he would do that was wrong, and the stevedores have been down there quite a while, they watch themselves.

Q. But your testimony is you took no safety precautions?

A. Always did take safety precautionary measures.

Q. What safety precaution did you take?

Mr. Kay: Just a moment. This is assuming that the man has testified, or that there was some safety precaution to take and he didn't take it. He just got through saying if he saw anything, had anything requiring his directing the men to take safety precautions, he would do so.

(Testimony of Ted Spirz.)

Now, obviously this witness has testified that there wasn't anything they did that was wrong, and therefore he didn't have to take any. That is the answer. He is trying to have the witness admit something that didn't exist here.

Mr. Harrison: Mr. Kay, here, your testimony is appreciated.

Mr. Kay: Well, it is an objection, your Honor.

The Court: Read the question.

(Question read by the Reporter.)

The Court: You may answer.

A. I took all the safety precautionary measures that were possible at that time.

Q. Name a specific safety precaution.

A. Well, I named one, only that if a man was going to walk under the plane when it was coming across the deck of the house [74] of the ship and it wasn't necessary for him to do so, I would tell him, stop him, get him out of there. That is a safety precautionary measure.

Q. That is admitted. Did you take any others?

A. If any came up that I don't remember—on the mechano deck there isn't, I didn't have to take any safety measures, the men know their safety measures themselves.

Q. Did you request at any time walking boards for the men to walk about on the mechano deck?

A. Walking boards?

Q. Yes, some sort of scaffolding or planks.

A. On top of the mechano deck?

(Testimony of Ted Spirz.)

Q. To be anywhere to give them better footing.

A. No, sir.

Q. Do you know whether or not such boards were available for your use in that vicinity?

A. Planking, available for me?

Q. Yes.

A. I don't know if they were or not.

Q. You don't know whether or not in this specific instance there was planking available for your use should you have chosen to use them?

A. If I chose to use planking, I can get all the planking from the Army I want but I wouldn't choose for planking.

Q. But if you did so choose, there was planking available? [75] A. Correct.

Q. Correct. Now, why didn't you use planking?

A. It isn't practical; you can't use planking.

Q. Why can't you use planking?

A. Because you have movable beams, that is, the mechano deck, you have to move the beams.

Q. Isn't it possible, when time to move the beams, you could also move the walking boards?

A. Are you talking about planking or walking boards?

Q. Planking. A. Would you repeat that?

Q. Isn't it possible when the time came to move the beams that if the planking were in the way you could move the planking?

A. Well, then it is the same, if you have your planking on your mechano deck and you bring your plane down and you have your three stands, and

(Testimony of Ted Spurz.)

the plane is in position to land and you have your planking there you have to move the plank.

Q. Yes.

A. But you can't move the planks because the plane's in your way. You hoist the plane up and put it on the barge, don't do any good, the planks are in your way. [76]

Q. Now, you move the beams when the plane comes down? A. Yes.

Q. Why not move the planks, if they are in your way? You don't have to put the plane back on the barge to move the beams?

A. You still have to get under the plane, and if the planking is there we have to get the planking all off the movable beams. May I show you what I mean? May I describe it?

The Court: Go ahead.

(Witness at the model.)

The Witness (Continuing): Have you any pencils or something for planking?

Now, if I were to—I wouldn't use planking, but if I did, I would use it this way. Now, you have a stand here and a stand here and a stand here (indicating). Then you can't use planking here at all.

Q. (By Mr. Harrison): Wouldn't it be possible to use planking this way and provide a place for the men to stand here, could still put their hands on the plane and perform the steadying operation by touching the wings without standing underneath the airplanes? Is that not possible?

(Testimony of Ted Spirz.)

A. No, it is not possible.

Q. You mean it is not possible to provide a place for men to stand where they wouldn't have to stand under the wing of that plane to steady it? [77]

Mr. Kay: He didn't say that. He is talking about putting planking on those beams and putting them in a fore and aft position.

The Witness: You are talking about fore and aft?

Mr. Harrison: I am not a stevedore or a walking boss.

The Court: You indicated——

Q. (By Mr. Harrison): I am suggesting here that is a possibility, I don't know how——

A. I will put the planking in for you and tell you why it won't work, if you want me to. The planking will have to be long enough——

Mr. Resner: You're indicating fore and aft?

The Witness: You want fore and aft?

Q. (By Mr. Harrison): You are the man, you tell me.

A. If we put it both ways, and then you will understand.

Mr. Resner: Put the planks across here, fore and aft.

The Witness: Fore and aft, and the plane is down, and we have the planking in here, all through in here——

Q. (By Mr. Harrison): I am not suggesting that necessity, I am suggesting the planking at a

(Testimony of Ted Spirz.)

place where a man could conveniently reach the wings of the airplane, or the nose, to steady it.

A. Well, you have to have planking over here for this. We will put a wing here (indicating).

Q. Talking about steadying, I am not putting the platform [78] underneath, I am talking about Mr. Leuhr was steadying the plane as it came down. Is it your testimony that Mr. Leuhr was there steadying the plane?

A. He was there steadying the plane, and he is there to land the plane.

Q. At this particular moment when the plane dropped he was steadying the plane?

A. That is correct, he was standing on a ten-inch beam and he had his hands on the tripod steadying the plane.

Q. On the tripod of the plane?

A. The landing gear, the stand, the tripod.

Q. He was entirely under the wing of the plane?

A. Partially under that tripod, that landing gear is underneath the wing so far. That is why you are under the plane to steady that plane, you have to get in there. When you get in there and grab hold of your landing gear, the wing's above you, over you, you're underneath.

Mr. Resner: When the witness said so far he indicated with his hands a distance of one and a half feet.

Q. (By Mr. Harrison): Is it not possible to steady the plane by putting the hands on the wing?

A. The wing is too high.

(Testimony of Ted Spirz.)

Q. Is it not possible to lower the plane down lower?

A. Then you have your tripod and stand in between here, liable to damage your landing gear (indicating). [79]

Q. How long are the tripods?

A. Oh, approximately, the tripod, from the lower part of the wing to the stand I'd say five feet.

Q. You mean the landing gear is five feet, extends below the beam?

A. I wouldn't swear to it, it is a guess, and the bottom under the wing comes to the bottom part of the wing and hangs down.

Q. How far does it suspend, the landing gear platform, above this platform before you make the final landing?

A. Before the final landing?

Q. Yes.

A. I would say anywhere within three inches to six, or maybe eight, at the most.

Q. And you say that the landing gear is approximately five feet in length?

A. Approximately, I would say that.

Q. And you say that the man standing there could not reach the wing that is only five feet above, the landing gear five feet?

A. Yes, he could reach it, but he couldn't steady it. There is nothing to hold, the plane, I mean.

Q. Something five feet above the man—Mr. Leuhr's height, I assume, is around five feet, four.

Mr. Resner: No. [80]

Mr. Harrison: Five feet, ten, excuse me.

(Testimony of Ted Spirz.)

Q. That would be about shoulder height?

A. The leading—trailing edge of the wing?

Q. Yes.

A. It is a little higher than that, and no place to grab. You can't—you can shove it, and there is a sharp point in the trailing edge, but you can't hold. If the plane wants to go that way, the wing won't do you any good, won't hold the plane. The taglines are of no use when it gets down that far.

Q. Why not?

A. Because the tag lines are gone when you get, reach the object, and you see that tag line, you see that man over there, see what he is doing, you can see that man over there, and they are working with the plane. The wing is swinging, the three men—you see what is happening, but when the plane comes down there is no vision here, he can't see that man, he can see his feet, but you can't see what he is doing with the hands. That is why you discard your tag lines when the plane comes within reach and you can grab that stand on the landing gear. Then your tag line is of no more use to you.

The Court: The landing gear, you mentioned that a number of times. The landing gear, you say, is about five feet. What does that consist of?

The Witness: That is where your wheel goes, your Honor. [81] It is sticking down.

The Court: Yes.

The Witness: And your tripod is your stand where you land it on your platform.

(Testimony of Ted Spirz.)

Mr. Resner: The wheels are off, Judge; they have tripods.

Mr. Kay: There is a picture that shows it. It is in evidence, and I think, if your Honor wants to look at that——

The Witness: Getting back to——

The Court: I just wanted to follow the testimony.

Q. (By Mr. Harrison): You testified you were standing with your hand on the nose of the plane?

A. That is right.

Q. Yet you say that it is necessary to reach under there and grab the landing gear, he can't properly handle the plane from the height of the wing. How did you reach the nose?

A. I was on the catwalk.

Q. The catwalk appears to be the same height as the mechano deck.

A. Correct, and a part of the nose is just like an oval, doesn't do any good, you can push this way, you can't pull, you can't grab. I was standing there and I had my hands on the nose.

Q. How high were your hands?

A. Why, I'd say up in here. (Indicating) [82]

Mr. Resner: Just above your head?

The Witness: Just above my head, around five and a half, six feet, seven feet. The reason I had my hand on the nose of the plane, if the plane is moving, then I know somebody is not holding onto the plane. That is what I always do, if I am not under the plane on the tripod, got my hand on that,

(Testimony of Ted Spirz.)

I know whether or not the plane is moving, and if it moves, it is going to hit something.

Now, if you want to know about the planks, you have to move these beams at the last instance.

Q. (By Mr. Harrison): How much do you have to move them?

A. It depends on my guess before the plane comes in. I always—

The Court: Depends on your guess, did you say?

The Witness: Yes. If I guess pretty close we don't have to move these beams maybe only six inches or eight inches. If I guess wrong, we might have to move them three feet. That means I have to move these exactly right, get it exactly enough apart of the platform, can't get them too close so this will be wobbly, I can't get it out too far, they have to drill a hole on the outside, and a hole here.

If we have planking on top, or planking fore and aft, then that whole operation will have to stop, because I have to move that one, and I have to move these over here. Now, this one here that has planking on it, it stops me from moving [83] this movable beam. The planking is heavy two-inch plank, have to have anything from two inches or over, if you want safety. But the plank is in the way. All these planks would have to be taken away, and we couldn't lift up the planks with the plane there and jeopardize the men trying to get the planks out, because you are underneath and it is just not practicable to use planking. [84]

Q. You would only have to move the beams six inches, why not move the planks six inches, too?

(Testimony of Ted Spirz.)

A. If I have to move this beam six inches and I have planks here, the men can't move that beam at all.

Q. Move the plank, could they not?

A. Have to get the plank off.

Q. Why can't you move it, slide it easier than a beam?

A. Yes, we move the plank, but you still have to move the beam, but I am not interested in that, I am interested in moving the beam. I have to get the plank off the beam to move the beam.

Q. You have planks on the athwartship beams, you wouldn't have to move them any further than you would have to move the beam itself to get it out of the way?

A. I will take this ruler here, I put a plank in here, fore and aft. That is going to stop me from moving this fore and aft beam. I have to pick it up.

Q. Why can't you slide it?

A. Slide what?

Q. Slide the plank the same as the beam?

A. Where would you slide it to?

Q. Well, now, there is certainly enough space between the beams to move the planks back and forth.

A. I can move the plank.

Q. All right, that is all I am asking you. You could move [85] it out of the way.

A. But I still have to move the beam.

Q. Admittedly, but it would be possible to put a plank in there——

(Testimony of Ted Spirz.)

Mr. Kay: Just a moment. Now, planks, that is a confusing thing, and I tried to get away from that, how many planks—you were trying to explain if you have one plank obviously somewhere out in the middle or at the end you can move it.

The Witness: Yes.

Mr. Kay: How many planks do you mean, counsel?

Mr. Harrison: Planks, enough to provide the men a safe place to work.

Mr. Kay: All right, how many is that?

Q. (By Mr. Harrison): Mr. Spirz—

Mr. Kay: Well—

The Witness: Well, I say it is not—it is impossible to use planking on a mechano deck. You can't load an airplane or airplanes with planks on top of your movable beams.

Q. (By Mr. Harrison): You're testifying that it is impossible, Mr. Spirz? A. Correct.

Q. Thank you; I want to be sure that we remember that you said it was impossible, Mr. Spirz.

A. That is correct.

Q. You want to take the stand again? [86]

(Whereupon the witness resumes the stand.)

The Court: Are you going to get through with this witness by 4 o'clock?

Mr. Harrison: Well, I have—

The Court: I will give you plenty of time to think over the problem, as we have an expert here,

so you can make the most of it. I will give you an adjournment.

(Whereupon an adjournment was taken to the hour of 10 o'clock a.m., Tuesday, March 18, 1952.) [87]

Tuesday, March 18th, 1952, 10 o'Clock A.M.

The Clerk: Frank Leuhr vs. U.S.A., further trial.

Mr. Resner: Ready.

Mr. Harrison: Ready.

Mr. Kay: Ready.

Mr. Harrison: Your Honor, please, we were going to continue the cross-examination of Mr. Ted Spirz.

TED SPIRZ

recalled as a witness for the libelant, and having been previously duly sworn, testified further as follows:

The Clerk: Ted Spirz to the stand, heretofore sworn.

Cross-Examination

(Continued)

By Mr. Harrison:

Q. Mr. Spirz, I hope we can get ahead a little quicker today. I have a very few questions I want to take up with you. As a walking boss, you are familiar with the Pacific Coast Marine Safety Code, are you not? A. Yes.

Q. Are you familiar—let me ask you this first:

(Testimony of Ted Spirz.)

At the time that the accident to Mr. Leuhr occurred what was the intended travel of that load?

A. I don't follow you.

Q. Let me put it this way: At the time, the next motion that was to be made with that load was lowering it, was it [88] not?

A. When that plane stopped and Mr. Leuhr had hold of it, and I was at the nose, with my hand on the nose, and Mr. Rosenstock was there by the nose, and Charley, the whistleman—Mr. Rosenstock and I decided to swing it over a little more, so we told Charley to swing it over a little more and he gave the signal.

Q. I see.

A. When the whistleman blew his whistle, and then when he got through blowing his whistle—and he blew it more than once, three or four: I thought there were four—he stopped, and when he stopped the plane dropped.

Q. Do you remember which way the plane moved at the time Mr.—Charley—I guess that is Mr. Cates, is it not? A. Yes.

Q. Do you remember which way the plane moved on his signal?

A. It didn't move. It didn't move sideways. It dropped.

Q. Which direction did you intend it to go? Which direction did you and Mr. Rosenstock want it to go? A. Aft and inshore.

Q. Was that——

(Testimony of Ted Spirz.)

A. (Interposing): I mean aft and offshore. That would be aft and towards the midships.

Q. Was that toward Mr. Leuhr or away from Mr. Leuhr? [89]

A. That would be, where Mr. Leuhr was standing, it would be going away from him.

Q. Away from Mr. Leuhr? A. Yes.

Q. Is it true, Mr. Spirz, that the Pacific Coast Marine Safety Code has some specific provision which requires men shall not stand underneath a suspended load?

A. There is a rule in that book that states that. And if you have—we will take an example, a load of canned goods or a sling load of sacked sugar or coffee, that load is only probably four feet wide at the most and five feet long, and the smallest hatch on a ship—the square of the hatch, like a Liberty No. 3 hatch is twenty feet—a square of twenty feet. A man can stand in the square of that hatch and not be under the load.

An airplane with a wing spread of 35 or 40 feet, and with the landing gear underneath the wings and the tripod stand underneath the wings—three landing gears under the wing, the wing is above—that is not a proper place to hold onto an airplane. The most logical place for any stevedore to hold onto an airplane is that landing gear, that tripod, and that is the lowest part of the airplane.

To land that airplane, you can't go by that. You have to hold onto that plane, that tripod has to be held to land on that platform. You can't stand out

(Testimony of Ted Spirz.)

and hold the wing and [90] leave that tripod loose, because on that jet plane that tripod is flexible. It wiggles. The only thing that is a holding place is, on the other side there is a piece of wire and it has a movement and it isn't a tight bearing.

Q. Why is that a good place to steady the plane, Mr. Spirz?

A. Because I have hold of the thing, the tripod, you can put your hand against it, push it this way.

Q. But if it is movable, it wouldn't steady the airplane?

A. Yes. It is flexible. It will move. At the point of landing we have difficulty keeping that tripod steady. That is why we have to have a man under there. He is astraddle the beam, and he has to be underneath that plane, and there are three places it has to be held and there are at least three, four, five men under the plane, at the exact moment of landing.

Q. All right.

A. We can't get away from being under that plane. It is that low. A man holding to a sling load of canned goods or coffee, it isn't necessary. You don't have to.

Q. There is no such exception to the rule in the book, is there, Mr. Spirz? It doesn't say a man shall not stand under a sling load unless necessary, does it?

A. It says a man shall not stand under a load.

Q. Period. [91] A. Period.

Q. And it says, "shall," does it not?

(Testimony of Ted Spirz.)

Mr. Resner: If the Court please, I think the best evidence is the Code itself.

Mr. Harrison: Mr. Spirz says he is quite familiar with it. A. I am, sir.

Mr. Resner: If I may be heard, the best evidence is the Code itself.

Mr. Harrison: I would like to question him on his understanding of the Code.

Mr. Resner: If I might be heard, Judge—may I?

The Court: Yes.

Mr. Resner: The Code is the best evidence of what it contains, your Honor. The Code was a part and is a part of the union contract between the union and the employers. It contains the standards of conduct that the parties have agreed amongst themselves shall guide safe practices in the industry. This situation, as the witness explained, is one which is a particular and peculiar situation, which is not provided for in the Code. This was the only way this job could be done, and what the Code provides about the thing has no relationship to the job, and cannot. If Mr. Harrison wants to put in the Code, we have no objection, then he can argue it to his heart's content to your Honor. [92]

Mr. Harrison: I will introduce the Code in due time. Mr. Resner's interpretation of whether or not the Code applies to this particular action is appreciated, but—

The Court: What is before the Court now?

Mr. Harrison: Only the fact that Mr. Spirz says

(Testimony of Ted Spirz.)

he is familiar with the Code and I am questioning him as to his understanding of the Code.

The Court: The Code will have to speak for itself regardless of what his interpretation may be.

Mr. Harrison: I intend to and will now offer the Code in evidence, your Honor.

The Court: It may be admitted and marked.

Mr. Harrison: May we introduce this as respondent United States of America's Exhibit A?

(Code referred to was admitted into evidence as Respondent United States Exhibit A.)

Q. (By Mr. Harrison): Mr. Spirz, to change the subject for a moment, how wide is a strongback, generally speaking?

A. Well, you have different sizes of strongbacks. You have different types of ships. I would say the king strongback, you have the—those full hatches, you have probably two inches on each side. A blind strongback, you have a surface of approximately six inches. And there are some strongbacks approximately eight inches wide. There is different types of ships and there is different types of [93] strongbacks.

Q. But they vary between six and eight inches? Sometimes they are even wider than that, are they not, will go as much as fourteen to fifteen inches?

A. With a strongback, fourteen or fifteen inches?

Q. I could be wrong.

A. I haven't seen any.

Q. But they vary between six and eight inches?

(Testimony of Ted Spirz.)

A. They vary, the average strongback, they do.

Q. But they are fairly much the same size as the beams to which we are referring, is that not true? A. Well, it depends on——

Q. Same width? A. Depends on——

Q. This seems to be a very simple question, Mr. Spirz. Are they or are they not comparable in width to the beams?

A. They are comparable in width, yes.

Q. Is it not true the Pacific Marine Safety Code expressly provides men shall not walk or climb on strongbacks in place? A. That is correct.

Q. Do you believe it is any safer to walk on one of these beams than it is on a strongback?

Mr. Kay: I object to that as incompetent, irrelevant and immaterial.

Mr. Harrison: Withdraw the question, your Honor. [94]

Q. (By Mr. Harrison): As a walking boss, you are paid by the hour or day?

A. I was employed by Jones Stevedore Company on a monthly salary up to approximately two years ago, and then I went on the plug board.

The Court: On the what?

A. We have a union—walking boss union and what we call a plug board. In other words, I am free lancing. I will work for the Jones Stevedore Company, I will work for the West Coast. I work for them all now.

Q. (By Mr. Harrison): But at the time of the

(Testimony of Ted Spirz.)

accident you were free lancing, were you, or were you employed by Jones?

A. Well, the accident was twenty months ago, approximately?

Q. Yes.

A. Then I was on the plug board. But I preferably and mostly worked for Jones even today.

Q. As I understand it, employees who are not steady employees of a specific stevedore company are entitled to go to some company even though they are on the plug board, if they so desire? If you have a choice, you work for Jones?

A. Correct.

The Court: What about the board? Distribution of work?

A. The plug board is, when I am working on a job and I know I will be through today, and say it is the Jones Stevedore [95] Company, they don't have any work tomorrow, I will call up the secretary and say I am available. There may be another company wants a man, and he will tell them who is available, say Spirz and Joe Doakes, and he will say, "I want Joe Doakes," and, "I want this one," and that is how we are employed.

Q. (By Mr. Harrison): The stevedore company—Jones in this instance—gets paid by the number of tons loaded, do they not?

A. Jones? I have worked for them eight years now, six years steady. They don't tell me what they make. They don't tell me how much. They might tell me it is a tonnage basis, but they won't

(Testimony of Ted Spirz.)

tell me what they are getting. If it is cost plus they might tell me if I ask, but they never——

Q. Did you know what basis Jones was being paid on?

Mr. Kay: Just a moment. The contract speaks for itself. This was done pursuant to contract. It is on there. We have even pleaded it. This man doesn't know anything about it. He has said so.

Mr. Harrison: He said sometimes he would, sometimes he didn't.

A. I knew if it was a contract job, probably, but I didn't know what they made.

Q. (By Mr. Harrison): Did you know whether it was tonnage or cost plus? [96]

A. I knew the airplanes is a tonnage job.

Q. In other words, the more tons they loaded a day, the more money Jones would make?

Mr. Resner: That hasn't a thing to do with this case.

Mr. Harrison: I am sure I can tie this up, your Honor.

The Court: What is that?

Mr. Harrison: I am sure I can tie this up. I intend to show that if they took the time and went to the inconvenience of providing what we consider necessary safety equipment, it would have delayed the work, would have taken a longer time to perform this work. On a tonnage basis Jones Steve-dore Company would have suffered by the fact that fewer tons were loaded per working day. If the witness knew it was a tonnage basis, I intend

(Testimony of Ted Spirz.)

to ask him whether or not providing safety equipment as such would have delayed the work.

Mr. Kay: We will object further on the ground that if that were the case, the witness should be asked if it took three times as long, or whatever it took, to do the job, if they might contend they should have required a higher tonnage payment.

The Court: I am afraid we are going afield. For example, whether you load ten tons in twenty hours, how [97] would that enter into the merits of this case?

Mr. Harrison: I would like to show, your Honor, the reason that they failed to take safety precautions was that they were attempting to load as many possible tons per day in order to make more money—ordinary incentive.

The Court: They all do that, whether it be sugar or cans or whatnot. Everybody is out to get the money. But our problem here is the question of, an accident occurred. In spite of the rule, necessity has men going under these planes. To me that has no answer. I say that kindly.

Mr. Harrison: We intend to show, your Honor, by subsequent witnesses this job could have been done in a far safer manner and it wasn't.

The Court: Go on. Proceed.

Mr. Harrison: I believe that is all I have, Mr. Spirz.

(Testimony of Ted Spirz.)

Cross-Examination

By Mr. Kay:

Q. Mr. Spirz, on this job, you testified Mr. Rosenstock was aboard the vessel, the Shawnee Trail?

A. That is correct.

Q. And Mr. Rosenstock, he is the representative for the army, is that correct, the air force?

A. That is correct.

Q. Was there any other government representative there?

A. Well, at that time of the accident I don't think so, but there is always an officer from Camp Knight, an army [98] officer, that is around or aboard ship.

Q. On this particular job? He was there at that particular instant, that is, the instant of the accident, there was another army representative there, too, superintendent, wasn't that correct?

A. Well, always around.

Q. That is what I mean.

A. It is his duty. The army requires an officer to go to different ships that are being handled, working army cargo.

Q. And he generally——

Mr. Harrison: Excuse me. May we have the answer clarified? You asked him whether or not an officer was there at this particular time. I don't believe he answered.

Mr. Kay: I think he answered.

Mr. Harrison: He did not answer yes or no.

(Testimony of Ted Spirz.)

The Court: Was there or was there not an officer there at that time, at that particular time, if you know?

A. No, he wasn't.

Q. (By Mr. Kay): But Mr. Rosenstock, however, was? A. Yes.

The Court: Pardon me, what was the duty of the Government representative, Rosenstock?

A. The duties of an officer—

The Court: Of Rosenstock?

A. He is in charge of the airplane, the safety of it, and [99] he is—the lashing; anything that we do, if he says he doesn't want it that way, we don't do it that way. If he wants it this way, we do it that way. He is, in fact, he is in charge of me. He is my superior when we are on the job.

Q. (By Mr. Kay): If there is anything about the way in which you are doing this work which is not satisfactory to the army man, Mr. Rosenstock, would he have the right to direct you to do it otherwise? A. Yes, sir.

Mr. Harrison: I object, your Honor. This witness doesn't know what the duties of an army officer are, a civil service employee.

The Court: Well, he may answer. He may tell us what was done down there, what the officer did.

Mr. Harrison: That is true, but he asked whether or not Mr. Rosenstock had a right to tell him. Whether or not he told him is one thing; whether or not he had a right to, I suggest this witness is incompetent to say.

(Testimony of Ted Spirz.)

Mr. Kay: Let me clarify this, and we will go into it another way which I think will be satisfactory to Mr. Harrison.

Q. (By Mr. Kay): How many of these ships did you say you had worked on with mechano decks loading planes? I think you mentioned about twenty-four?

A. Approximately about that. [100]

Q. Covering a period of what time?

A. Since the Jones Stevedore Company received the contract at the Alameda Air Base, and we got the contract—Jones Stevedore Company got the contract to load airplanes on ships.

Q. Is that a period of about a year, or just what?

A. Well, up to the time of the accident?

Q. Yes.

A. Well, from approximately 1945, early part of 1945, up until the accident. We were loading mostly during the war—

Q. (Interposing): That is several years, is it not? A. Yes, it is.

Q. When was the first time you saw Rosenstock on any of these jobs? Had he been on other jobs than the one where the accident happened?

A. We loaded a lot of planes below decks—we have loaded many airplanes below decks, and the first time I saw Mr. Rosenstock I think he didn't have that job. But he was—he came over and watched the work.

(Testimony of Ted Spirz.)

Q. I am trying to find out when you first had occasion to work under Mr. Rosenstock?

A. When——

Q. Was it more than this one occasion?

A. Oh, yes. [101]

Q. That is what I am trying to find out. Was it several times?

Mr. Harrison: I object to the phrasing of the question. The way Mr. Kay put the question is, "Are you working under Mr. Rosenstock?" My point is—may I examine on voir dire?

Mr. Kay: I don't think he is entitled to.

The Court: It may clear the situation.

Voir Dire Examination

By Mr. Harrison:

Q. Was Mr. Rosenstock your employer?

A. No.

Q. Did Mr. Rosenstock at the time of this particular accident give orders to any of your men?

A. No, sir.

Q. Did Mr. Rosenstock at the time of this accident give orders to you? A. Yes, sir.

Q. Concerning what?

A. The work. Concerning everything that pertained——

Q. Did he demand——

Mr. Kay: Just a moment, let him finish his answer.

The Court: Finish your answer.

(Testimony of Ted Spirz.)

A. Mr. Rosenstock gave me orders of where he wanted the airplanes.

Q. (By Mr. Harrison): Where he wanted the airplanes? Did he give you any orders concerning the method in which to [102] load the airplanes?

A. Yes, sir.

Q. what?

A. For instance, the planking. He designed the planking, the platform. Maybe I didn't like the platform. Maybe I thought we got a little lighter one would do, but that was his platform and we used his platform.

Q. Did you make such suggestion that he use a lighter planking?

A. I made a lot of little suggestions and if he agreed, we would; if he didn't, we wouldn't.

Q. Did he give any orders from the time you took over the loading of the planes, that is, took over the direction of your men, as to steadying the placing of the airplane? Did he give you any orders, say, "Don't have that man stand there," or, "Don't do this or do that"? Did he give you any orders in that respect?

A. No, not that I remember.

Mr. Harrison: Thank you.

Cross-Examination

(Continued)

By Mr. Kay:

Q. Was Rosenstock, then, the man you would always look to to see whatever work was done was

(Testimony of Ted Spirz.)

done satisfactorily insofar as the army was concerned?

A. Mr. Rosenstock and I worked hand in hand, and he had—he drew the plan and everything he wanted done that was safe, [103] and it was always safe, I had to do, and I would gladly do because we worked together and it made my work easier.

Q. If you thought work should be done a certain way and he wanted it another way, how was that handled?

A. He was in charge because my superintendent told me to take orders from Mr. Rosenstock.

Q. All right. Now, on this occasion or any other occasion that Mr. Rosenstock was present during the loading of planes on mechano decks, did he ever suggest to you or direct you to put planking on the mechano deck?

Mr. Harrison: I object. This particular occasion is the only thing we are concerned with.

Mr. Kay: Oh, no.

Mr. Harrison: Previous times are not in issue.

Mr. Kay: I will do it this way:

Q. (By Mr. Kay): On this occasion that the work was being done when Mr. Luehr was injured did Mr. Rosenstock ever make any suggestion or give you direction to put any planking on the mechano deck? A. No, sir.

Q. On any other occasion that you worked with mechano decks, that is, putting planking on mechano decks, in which Mr. Rosenstock was present, did he

(Testimony of Ted Spirz.)

ever suggest or direct you to put planking on the mechano deck? A. No, sir. [104]

Q. Now, so far as you were concerned, in your experience as a walking boss or as a longshoreman, did you ever hear a longshoreman object to working on the mechano deck on a vessel such as the Shawnee Trail on the ground that it was unsafe?

A. No, sir.

Q. And did you ever hear of anyone in the longshore industry that ever objected or suggested that this was an unsafe structure? A. No, sir.

Q. Now, I imagine that in the course of your career as a walking boss, when you were handling these mechano decks, a loading job, you must have loaded hundreds of these planes, is that correct?

A. On a mechano deck?

Q. Yes.

A. I would say hundreds. Below decks, thousands. Up to a thousand of them.

Q. In connection with the mechano deck, that is the situation we have in the Shawnee Trail, was there ever an occasion when any man fell off of that deck? A. No one.

Q. Did you ever hear of any such incident?

A. No, sir.

The Court: Approximately how many planes can you put on a [105] deck of that kind?

A. Aft and forward, approximately 15 of those big—depends on the type of plane. The smaller plane, you would get more, and the larger plane like this jet, which is quite huge, you get less.

(Testimony of Ted Spirz.)

Q. (By Mr. Kay): Now, at the time that this plane suddenly dropped on Mr. Luehr, was there any sign or signal or anything you could observe that gave any warning that the plane was about to drop? A. None whatsoever.

Q. Now, Mr. Luehr was standing on one of these cross beams, that is a solid ten-inch thick beam, isn't that right? A. That is right.

Q. When you testified earlier you mentioned that you were over on the catwalk. After he fell you came down the stairs to a point, arriving just forward of the midship house. You didn't take an exact note of just where that was at that time, did you? A. I wouldn't be exact, no.

Q. And it would probably be up in the area of the No. 2 or above, or forward of the No. 2 beam, counting from the midship house forward, is that right? Up in here (indicating on model)?

A. It could be two or three beam.

Q. And that beam is a solid, affixed beam, is that correct? [106]

A. That is correct. That is solid.

Q. Now, referring to this afterthought of the Government with respect to the alleged use of planking, if there had been planking along here where Mr. Luehr had to stand to do this job at the time this plane fell, and he had been standing there holding onto the plane, as you testified he was required to do, and that plane fell suddenly, as it did on this occasion, would the fact that there was that planking there have prevented Mr. Luehr's injury?

(Testimony of Ted Spirz.)

Mr. Harrison: I object, your Honor. Requires a supposition of the witness. [107]

Mr. Kay: Supposition based on his—their whole case.

The Court: Overruled. You may answer.

The Witness: Answer the question?

The Court: Yes, read the question.

(Question read by the Reporter.)

A. Well, it is a blessing he didn't have any planking under him, because he was under that plane holding on, that plane hit him solidly on the shoulder and drove him down, and if there was planking under him he would have been crushed, he absolutely would have been crushed and on top of that planking the plane bounced, he would have been hit again if there was planking under him.

Q. (By Mr. Kay): All right. When Mr. Luehr was struck by this plane you say it was a direct crushing blow, it wasn't a glancing blow?

A. It drove him down, it hit him straight on the shoulder and drove him straight down.

Q. And after it hit him was he momentarily caught up there, his legs?

A. I didn't see his legs.

Q. But could you see the other part of his body?

A. I could see the other part of his body, yes.

Q. And what position was that in?

A. Well, being no planking there he was below the fore and aft beam, see? [108]

Q. So that he was hanging toward the deck?

(Testimony of Ted Spirz.)

A. He was hanging toward the deck, yes.

Q. And you are indicating with your hands extended down toward the deck, is that correct?

A. Correct.

Q. And after the plane bounced, then did he slide down to the deck in that position?

A. He fell.

Q. From that position?

A. From that position he fell to the deck, and I might add he fell nicely.

Q. Yes.

A. That's why—I just know that if there was planking there he would have been crushed.

Q. Yes. Now, one other question, Mr. Spirz. On this model that you see here you find the deck below the mechano deck is free of any piping and so on. Will you state whether or not on the Shawnee Trail in this particular area where Mr. Luehr was hurt, what was the condition with respect to whether there was piping or obstructions or anything of that sort?

A. Well, where Mr. Luehr was hurt, where Mr. Luehr fell it was fortunate there was a clear space. But other areas where it is just piping, ventilators. Where Mr. Luehr fell he fell in a clear space, he fell towards the rail where there [109] is a passage-way to walk.

Q. But in this entire area, I am referring to this whole section that you see in the model, will you state to the Court, and I think we have some pictures here that will show it, but not too clearly,

(Testimony of Ted Spirz.)

where there is a maze of pipes, ventilators that have openings that hinge up, and structures of that sort that would prevent putting a Save-all or something of that sort in there?

A. Oh, yes, there is a maze of pipe along the main deck, there is valves, there is vents that they open up, it is a hatch type affair, just a maze of pipes and vents all through the whole main deck; by the mast is a winch.

Q. And in view of that situation will you state whether or not it is feasible to put a Save-all or net underneath there?

A. No, it isn't—not feasible.

Q. And if a Save-all or net had been under this area where Mr. Luehr fell, would that have prevented his injuries?

Mr. Harrison: I object to that, definitely calls——

Mr. Kay: All right, I will withdraw that. That is all.

Recross-Examination

By Mr. Harrison:

Q. May I ask a few more questions? There were other men under this airplane when it fell, were there not, Mr. Spirz?

A. I don't know if there were other men under the airplane. [110]

Q. Other men working around it, were there not? A. Yes.

Q. How come they were able to escape when the plane fell?

(Testimony of Ted Spirz.)

Mr. Kay: I object to that as incompetent, irrelevant and immaterial, no proper foundation, your Honor.

Mr. Harrison: He is supposed—he is supposing what would have happened to Mr. Luehr.

The Court: Foundation hasn't been laid.

Q. (By Mr. Harrison): Where were they?

A. Well, I can explain why I don't know where the other men were. The nose, I was by the nose on the forward side of the nose on the catwalk.

Q. Yes.

A. I could see Mr. Luehr, but I couldn't see aft. I couldn't see, there was a wing and the nose, and I was talking about the ship, moving it, and I didn't notice, but when the plane dropped I was—happened to be in a position where the only one I could—I saw when I looked, I knew he was there, was Mr. Luehr.

Q. Yes. Then you don't know whether there were any other stevedores underneath the plane or not?

A. I couldn't swear to it.

Q. However, no other stevedores were injured at this time; correct? A. Correct. [111]

Q. Can one man perform the job of steadying the plane and putting it into position?

A. Of putting it into position?

Q. Can one man perform the job of steadying the plane?

A. You want to know if one man can steady the plane?

(Testimony of Ted Spirz.)

Q. Yes. In other words, could Mr. Luehr by himself have performed the job which you were asking to be done?

A. Well, I want to clear myself. To steady the plane?

Q. Do the job which you wanted done, could Mr. Luehr have done it by himself?

A. Going to land a plane, Mr. Luehr could never do it by himself.

Q. Then it is safe to suppose that there were other men in similar positions to Mr. Luehr in order that this job could be done?

Mr. Kay: Just a moment, I object to that as conjecture, your Honor. Already testified he doesn't know, and I don't think any witness can suppose what——

Mr. Harrison: You just had him suppose what would have happened——

Mr. Kay: No, that was based upon your supposition; this is an entirely different thing, your Honor. He has already testified he couldn't see where the other men were.

The Court: In any event, he didn't see anyone else there, may have been there, but he didn't see them. [112]

Q. (By Mr. Harrison): You don't know—you know there were other men working when the plane fell? A. We have a gang of men working.

Q. They were working around the plane, were they not?

(Testimony of Ted Spirz.)

A. They were all around there on the catwalk; Mr. Luehr I saw.

Q. Were there any other men on the mechano deck?

A. The only one I saw on the mechano deck at the time of the accident was Mr. Luehr.

Q. What part of the plane hit Mr. Luehr?

A. The wing, the trailing edge of the wing, I saw it hit Mr. Luehr on his left shoulder.

Q. You saw how it threw him, squashed him directly down?

A. It buckled him up.

Q. I see. I call your attention, return now to the duties of Mr. Rosenstock. I call your attention to your testimony yesterday. Fortunately it has been transcribed and I have it here before me, the Reporter's daily transcript. On page 28, line 7, this question was asked of you, Mr. Spirz.

Mr. Resner: Line 7?

Mr. Harrison: Line 7, page 28.

Q. This question was asked of you:

“Question: All right. What does Mr. Rosenstock have to do with that particular operation at that point? [113]

“Answer: He has nothing to do but just observe.”

A. What point are you talking about?

Mr. Kay: Pardon me just a moment. Your Honor, I think it is very unfair, the rest of the questions and answers ought to be read in connection with that particular subject, and I think it will show it is pretty well clarified.

(Testimony of Ted Spirz.)

Mr. Harrison: I was looking for it, your Honor; I didn't place it on this short notice; I didn't realize the witness was going to change his testimony over night.

Mr. Resner: I think that is an unwarranted statement, if your Honor please.

The Court: Well, I will allow it for the heat of the battle.

Mr. Resner: All right, Judge.

Mr. Harrison: If you would like to find the portion you would like to have read, Mr. Kay.

Mr. Kay: Yes, I will read it. That is line 7.

“Question: All right. What does Mr. Rosenstock have to do with that particular operation at that point?”

“Answer: He has nothing to do but just observe.

“Question: I see. Well now, does he tell you where to spot the planes?”

“Answer: Yes, he has a plan and we get it prepared, we get it ready before the plane comes in. [114]

“Question: Is that plan one developed by the Army?”

“Answer: Well, I think Mr. Rosenstock developed the plans.

“Question: He is with the Army?”

“Answer: He is with the Army Air Corps, yes, sir.”

Mr. Harrison: May I add to that, your Honor, page 25, line 20.

(Testimony of Ted Spirz.)

“Question: Who is Mr. Rosenstock?”

“Answer: Why, he is in charge of the airplanes for the Army Air Corps, so far as I know. I don’t really know his title, but he is in charge of all the airplanes, responsible.”

I believe that is the only other reference.

Mr. Resner: If your Honor please, on page 29 at lines 10 to 14:

“Question: Then that would be parallel to the catwalk?”

“Answer: Fore and aft. That is for the nose and wheel stand, we have one there and then we have two others for the rear two wheels, and on Mr. Rosenstock’s plan he gives an idea just where those wheels will be.”

Your Honor asked: “Those are adjustable? Are they [115] adjustable, or when are they put on there?”

“The Witness: I don’t understand.

“Q. (By Mr. Resner): The Court says when are they put on?”

“The Court: When you are lowering the plane?”

“The Witness: The stand on the—no, these platforms are put on these movable beams.

“The Court: Yes.”

Mr. Harrison: I believe those are all the references to Mr. Rosenstock.

Q. Mr. Spirz, you were called here as a witness by Mr. Resner, were you not?

A. I was subpoenaed, yes.

Q. Subpoenaed by Mr. Resner. Have you dis-

(Testimony of Ted Spirz.)

cussed your testimony with Mr. Resner?

A. Yes.

Q. Have you discussed it with Mr. Black and Mr. Kay? A. Yes.

Mr. Harrison: I believe that is all.

Further Recross-Examination

By Mr. Kay:

Q. Mr. Spirz, before you ever discussed this with me or Mr. Black or Mr. Resner, the Government came over to you and got a complete statement about the accident, isn't that correct, or representatives of the Government?

A. That is correct. [116]

Mr. Kay: That is all.

Redirect Examination

By Mr. Resner:

Q. In other words, Mr. Spirz, anybody in any official capacity in connection with this case who asked you what you know about it, have you told them? A. That is correct.

Q. And what you told them, is that the same thing you have told the Court here during the course of your testimony yesterday and today?

A. That is correct, whatever they asked me I told them.

Mr. Resner: That is all.

The Court: Step down.

I beg your pardon; just a moment.

(Testimony of Ted Spirz.)

Mr. Resner: Oh, Mr. Cooper.

The Court: Almost forgot you were here.

Mr. Cooper: As counsel has indicated, I am really not very much concerned about the case. I mean, as counsel indicated by their actions they figure I am here just to watch the case being tried, but at any rate there are a few points which I think could be advantageously clarified, which I am not clear, perhaps familiarity of the others with the case would make this unnecessary.

Cross-Examination

By Mr. Cooper:

Q. But tell us, Mr. Spirz, how many platforms would have been in use at that time for landing this [117] particular plane on?

A. Just for one plane?

Q. Yes. A. Three platforms.

Q. Three platforms? A. Correct.

Q. And the three wheels which were in the form of a triangle were to go on those three platforms?

A. Correct.

Q. And as nearly as possible you positioned these as near as you could guess, I believe you used that expression, you positioned these platforms so that they might not have to be moved?

A. That is correct.

Q. You had to do one of two things, however, in almost every case, including this, did you not; you either had to move the platforms or had to move the plane, is that correct?

(Testimony of Ted Spirz.)

A. Move the platforms, or move the plane?

Q. Yes. A. Well, the way——

Mr. Cooper: Withdraw that.

Q. In this particular case was it, do you recall whether it was necessary to move any of the platforms? A. Will you repeat that question?

Q. I say, in this particular case do you recall whether it [118] was necessary to move any of the platforms in order to put them precisely under each wheel?

A. In every instance that we landed a plane, every single instance, we had to move the movable beams or the platform or both, or all three of them.

Q. I see.

A. I can explain further if you would like me to.

Q. Well, I think that answers the question but if you would prefer to go ahead——

A. I would like to prefer. It is precise, the job. Now, Mr. Rosenstock is efficient, and he is a good man. When he calls up his plane he has the nose right where the railing is, so you have a passageway, and then this platform is at a certain point, and the other platform, and I do my guesswork, and he helps me, "Let's put it there, let's put it here; that's just about it." When we get the plane over the spot the wing is out by the rail, and Mr. Rosenstock wants it over a little more, and we will fudge, we will go over the rail, we will put the nose over the rail.

Q. Talking about the rail of the catwalk?

(Testimony of Ted Spirz.)

A. On the catwalk. Now, when we do that we have to move the platforms, the three of them. When we move the three platforms we have to move the movable beams. We are trying to get that up close amidship to keep it away from the heavy seas.

Q. I understand that. [119]

The Court: You understand that, being of the sea.

Mr. Cooper: That part I do understand.

The Witness (Continuing): That is why in every instance your plane goes kaput, because we are going inboard, and when we land that plane, Mr. Rosenstock, oh, he will get ahold of the Mate and it will be okay with him, and it will be over the railing, because we ask him, because the nose is up about—up here (indicating) and liable to hit one of the sailors, he understands the situation, and we would not have asked him, he never refused it, they said okay.

Q. Am I correct in believing that two of the wheels are exactly opposite on the plane? That is, one is approximately under one wing and one is approximately under the other wing?

A. That's correct.

Q. And then the other wheel is toward the nose or toward the tail? A. Nose.

Q. Toward the nose? A. Nose.

Q. Am I correct in believing that the nose, that the plane was pointing approximately at right angles to the catwalk, that is, lining up the nose and the tail with the— A. The nose.

(Testimony of Ted Spirz.)

Q. At that particular occasion?

A. Yes, towards—pointing toward the [120] catwalk.

Q. I see, and the wings were extending out parallel to the catwalk?

A. Well, not exactly parallel, because we had the plane a little turned.

Q. I see, a little camber, as you would say?

A. A little camber on the wing.

Q. Then on this particular occasion, I take it from what you have said, it was necessary to have at least three longshoremen out on the mechano deck in order to move any beam that was necessary or any one or more of the three platforms, is that correct?

A. At this moment it wasn't necessary to have three men out there, because we still had to move the plane. We were fortunate in one respect, that we had still to move the plane, because we might have had three or five men there at the time the plane dropped.

Now, because we had to move the plane over the foot or so nobody was getting underneath to move the platform or the movable beams.

Q. Do I gather from what you say it was necessary at that particular stage for anybody to get under there?

A. At that particular point. It was only to hold that plane safe.

Q. In other words, steadying it, not move it.

A. Steady it so it wouldn't move. [121]

Q. Yes. Now, you have told us, I believe, on

(Testimony of Ted Spirz.)

direct examination, that no man ever refused to work on a mechano deck, no longshoreman, within your experience? A. That is correct.

Q. And I take it from what you have said then if any man objected to the conditions, why, then he could go ashore, he didn't have to continue to serve?

A. Well, he would tell the gangboss or preferably me, and then he would go to his business agent, of his local, and the business agent would come out and see me, if that was the case.

Q. He would go ashore and take it up ashore?

A. Yes, he would take it up with the business agent and the business agent would come to see me and ask me what, if it wasn't safe, what can we do about it. But no one ever has done that.

Q. If a man worked on one day on a ship he could stay ashore the next day, didn't have to come back or work the next day, did he?

A. No, sir, he didn't.

Q. A longshoreman working under the conditions where he lived ashore is free to go and come, work on the ship or not, just as he pleases?

A. He can quit when he wants, practically, if he wants work; if he doesn't want work, he doesn't work. [122]

Q. And for any reason at all?

A. For any reason.

The Court: This is a free country.

Mr. Cooper: That is what I wanted to develop, your Honor, it is a free country for a longshoreman.

Mr. Resner: And for Dorr, Cooper & Hayes.

(Testimony of Ted Spirz.)

Mr. Cooper: I hope so.

Q. Now, Mr. Spirz, you don't know for sure, I take it, whether there were any men actually out on the mechano deck other than Mr. Luehr at this time, or not?

A. I stated I didn't see them.

Q. You don't recall having seen them?

A. No, I saw Mr. Luehr way before—out on the deck before the plane was stopped.

Q. Can you tell us whether Mr. Luehr at the time he was attempting to do this job was actually standing on a thwartship beam or whether he was standing on a fore and aft beam, you did see him, his feet, where he was standing?

A. He came right out on the 10-inch beam, that stationary beam. He came right out on there, and that is where he stood, and fortunately that's where the landing gear was and that is where he was, he was standing on that 10-inch beam.

Q. I see. You had seen him come out and take a position on the 10-inch beam, had you?

A. That is correct. [123]

Q. Did he have to move—I will put it this way: did he move in order to take hold of the plane after that?

A. When he went up to the plane he put his hands right on it.

Q. Now you misunderstood my question, I am afraid, I take it from your answer that he had moved, he moved up from where he was standing and put his hands on the plane?

(Testimony of Ted Spirz.)

A. That is correct, he moved from the rail of the inboard side, port side up to the ship after it stopped and grabbed ahold.

Q. About how far did he move, would you say?

A. Well, he was on the outside by the rail, ten, twelve feet, somewheres in there, moved up to the——

Q. That is, he moved toward the port side, is that right?

A. He moved from the port side in to the mid-ship.

Q. Moved from the port side toward the mid-ship?

A. That is correct, he was outside by the rail of the ship on the mechano deck.

Q. Now, the vessel that you have worked on, was the mechano deck substantially the same as the mechano deck on the Shawnee Trail? The other vessels you worked on?

A. Yes, they are approximately the same.

Q. Approximately the same.

Mr. Cooper: I believe there is nothing further.

Mr. Resner: No questions. [124]

Mr. Harrison: No further questions.

The Court: Take a recess.

(Short recess.) [124-A]

Mr. Resner: If your Honor please, at this time the libelant and his counsel are satisfied that the evidence thus far clearly shows, and the evidence we know will be adduced will show that the efficient

and proximate cause of this accident was the negligence of this crane operator in coming in contact with the lever and dropping the plane, and we don't feel that the evidence has or will show that the vessel, so far as her structure was concerned, was unseaworthy, so we are going to make a motion to dismiss against the respondent American Pacific Steamship Company.

Mr. Harrison: We, for the Government, will certainly object to dismissal. It would prejudice our right to bring the American Pacific in as impleaded-respondent, and we would like very much to have American Pacific in here. There are many other reasons which probably will not appear during the course of the trial, which we believe the American Pacific should be here.

Mr. Kay: This may seem out of my field, but I think as a friend of the Court I can say they are not an impleaded-respondent. What happened originally, they had been impleaded by the Government. The Government then dismissed, and then Mr. Resner brought them in as a respondent. They are chargeable only—could only properly be liable to the libelant, and if the libelant chooses to dismiss, we will certainly be glad to see it and we join in that motion. [125]

Mr. Harrison: My argument is that the fact that they were a respondent, I didn't go ahead and implead them after Mr. Resner filed his amended complaint.

Mr. Resner: Your Honor has to understand—and I am sure you do——

The Court (Interposing): There is a lot I can't understand, but I will have no difficulty in this problem. They will stay in here, and I will ask counsel to make himself comfortable.

Mr. Resner: Without prejudice, I assume, your Honor?

The Court: Without prejudice.

Mr. Resner: We enjoy Mr. Cooper's charming personality.

Mr. Cooper: I am very glad I didn't have to say anything, your Honor, and I will try to keep quiet during the rest of it.

The Court: I suggest you relax until danger appears, then you might rouse yourself.

Mr. Resner: May I ask if there is a deposition available for Cecil Bailey and Charles Cates?

The Clerk: I will look for them. I didn't find them yesterday.

Mr. Resner: Then may I borrow that copy? I will read the questions and I will ask my worthy associate, Mr. Magana, to read the answers.

Mr. Harrison: We might suggest for the record that we [126] don't feel there is any necessity for reading the depositions. Of course the libelant is entitled to do so, but we would be agreeable to just submitting the depositions in the record.

The Court: You don't know my practice here. I want it to register now as we go along. It may be of assistance to me in the matter. I will have to read them if you gentlemen don't, so I will give you the burden of reading them.

Mr. Resner: If your Honor please, I might tell

you that on June 29, 1951,—last year—we took the deposition of these two men, Cecil Bailey and Charles Cates. Cecil Bailey was the man who was operating the crane which dropped the plane, and Charles Cates was the whistle man who stood on the catwalk and gave the signal. He is the man, Charley, Mr. Spirz referred to.

These men were both employees of the army at the time of the accident, and the appearances at that time were the same as the appearances in the Court before your Honor insofar as counsel are concerned. The witness was sworn and the examination proceeded. I interrogated the witness, and I will read the questions and ask Mr. Magana to read the answers.

Coming to page 5:

DEPOSITION OF CECIL BAILEY

“Direct Examination

“State your name, please? [127]

“A. Cecil Bailey.

“Q. Your residence?

“A. 535 Cypress Avenue, San Bruno, California.

“Q. How long have you lived there?

“A. About two years.

“Q. How old are you, Mr. Bailey?

“A. I am forty-seven.

“Q. What is your occupation?

“A. Well, I have been a crane driver for quite a few years, and I went to sea part of the time.

(Deposition of Cecil Bailey.)

“Q. How long have you been a crane driver?

“A. Approximately 12 to 15 years.

“Q. 12 to 15 years? A. Yes.

“Q. Are you employed at the present time?

“A. Yes.

“Q. By whom? A. By the army.

“Q. Is that by the United States Army?

“A. Yes.

“Q. And your pay checks come from the United States Treasury, do they? A. Yes.

“Q. That is, they are Treasury checks?

“A. They are checks, yes, Government [128] checks.

“Q. Yes. Where do you pick them up, or how do you get them? A. At Fort Mason.”

Mr. Harrison: If your Honor please, at this time it appears that there is no reason for taking this deposition. There is nothing to show that the man whose deposition was being taken was to be out of the district at this time. There is nothing to show he wasn't available at the time of trial, nor did we stipulate to the taking of the deposition.

Mr. Resner: Well——

Mr. Harrison: We suggest that the witness is as available to Mr. Resner as anybody else. If he wishes his testimony, he can subpoena him.

Mr. Resner: Mr. Harrison advised me the witness was in the Panama Canal zone. And so far as the stipulation is concerned, Mr. Ferguson said this:

“Before you proceed let the record show this deposition cannot be taken under the De Bene Esse rule, nor under the ‘Notice Given’ one, but it is being taken pursuant to an agreement to that effect, and we do not wish to have it taken as a precedent for the taking of depositions.”

Mr. Harrison: We agreed to the taking of the deposition. We did not agree that the deposition be admitted into evidence. [129]

Mr. Resner: I don't see how you can agree to taking a deposition and then not that it can go in.

The Court: If the witness is available——

Mr. Resner: Will you stipulate you advised me he was in the Panama Canal zone?

Mr. Harrison: I told you his friends told me he intended to go to the Panama Canal zone. Whether he was there, I don't know.

Mr. Resner: Let's not trifle with what you said to me. On two or three occasions in your office you told me Mr. Bailey was in the Panama Canal zone and would not be available for the trial. Did you or did you not tell me that?

Mr. Harrison: I did not.

Mr. Resner: Well, I represent to the Court I was advised by the United States Attorney the witness was in the Panama Canal zone.

The Court: Is anybody able to advise the Court whether or not he is available now?

Mr. Resner: I will ask Mr. Harrison to advise your Honor. This man is an employee of the United States, under their control, not ours.

Mr. Harrison: He is not an employee of the United States, your Honor. May I have the date at which he terminated his employment? I also have a note which I was referring to at the time I was talking to Mr. Resner, reading: [130]

“Cecil Bailey, crane operator, resigned from Government service on October 30, 1951, for reasons of poor health. Acquaintances state he was planning to go to Panama or Dunkirk. His last address is 535 Cypress Avenue, San Bruno.”

That is a note I made of the telephone conversation.

Mr. Resner: Under the rules——

The Court: Just a moment. When did you last hear from him?

Mr. Resner: The last and only time I ever saw the man was at the taking of this deposition.

The Court: You have no further information?

Mr. Resner: I have none.

The Court: The Government has no other information?

Mr. Harrison: In all fairness, your Honor, I must say a month after this deposition was taken this man came to my office and asked if I thought it would be necessary that he appear in Court. I advised him at that time that my interpretation of the rule was, if he were available he would be called; and he walked out of the office, and that is the last I saw of him. I made a phone call to determine his whereabouts and was advised as this note indicated.

The Court: Under the circumstances, and keeping in mind [131] the commitments of the counsel for the Government on the deposition, I will allow it to be read.

Mr. Resner: I am going to page 6.

(Thereupon the deposition of Cecil Bailey was read to the Court until the hour of 12 o'clock, noon, at which time an adjournment was taken to the hour of two o'clock p.m.) [131-A]

DEPOSITION OF CECIL BAILEY

Direct Examination

(Continued)

By Mr. Resner:

Q. At Fort Mason, San Francisco?

A. That's right.

Q. I direct your attention to July 28, 1950. Who was your employer on that date?

A. The Army.

Q. Who paid you at that time?

A. We got our checks from Fort Mason. Government checks.

Q. In the same way that you get them now, as you have just described to me? A. Yes.

Q. When did you go to work for the Army for the first time?

A. For the first time? I worked for them during the last war.

Q. All right. But let me put it this way: Immediately preceding today, when did you first start working for the government?

(Deposition of Cecil Bailey.)

A. I will be there a year the 17th of next month.

Q. The 17th of July? A. Yes, sir.

Q. So you started working for the government on July 17, 1950?

A. I believe it was—I'm not sure whether it was the 17th or 7th I started.

Q. Either July 7th or July 17th of 1950?

A. Yes, sir. [6*]

Q. And in what capacity did you go to work for the government? A. Crane operator.

Q. Where did you go for your employment?

A. At Fort Mason.

Q. Did you make application there?

A. Yes, sir.

Q. And they accepted you? A. Yes, sir.

Q. And you became a Civil Service employee?

A. Temporary.

Q. Temporary Civil Service employee?

A. Yes.

Q. And was your pay subject to various deductions that the government makes for social security and taxes? A. Yes, sir.

Q. And other deductions the government makes for annual leave and sick leave and things of that character?

A. They didn't—I don't believe they took out—Well, I was privileged for annual leave, yes, but I don't think they took out the retirement fund at that time. They took it out later.

Q. I see. And the situation under which you

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Cecil Bailey.)

first went to work for the government in July of 1950 and the circumstances under which you have worked for them continued to remain the same from that time until now? A. Yes.

Q. Is that right?

A. (Nodding affirmatively.)

Q. Who was your immediate superior in your work at July of 1950?

A. Captain Voortmeyer.

Q. Will you spell that?

A. Voortmeyer.

Mr. Harrison: Do you want me to spell it for you?

Mr. Resner: Go ahead.

Mr. Harrison: V-o-o-r-t-m-e-y-e-r. [7]

Q. (By Mr. Resner): Where is his station?

A. He's at Pier 2, Fort Mason.

Q. Fort Mason, San Francisco? A. Yes.

Q. Did he give you orders and instructions as to what jobs to go on, where to report for work?

A. Well, he gives us instructions to——

Mr. Ferguson: At what time, Mr. Resner?

Mr. Resner: In July of 1950.

A. (Continuing): He doesn't give us instructions as to what kind of work we are supposed to do. When we are alongside of a ship or going alongside of a ship we are either ordered by the boss longshoreman or somebody like that. I don't know. In other words, I am not the foreman of the rig. I have nothing to do with that.

Q. (By Mr. Resner): I understand that. But let me put the question to you this way, Mr. Bailey:

(Deposition of Cecil Bailey.)

Who sent you out on different assignments of work in July of 1950?

A. I think it was Mr. Cunningham had charge of the operators.

Q. Who is he?

A. I think he's Port Engineer there, I believe.

Q. For the Army? A. Yes.

Q. Well, let me ask you this question: When you came to work in July of 1950, you would report to work in the morning; is that correct?

A. That's right.

Q. Where would you report?

A. Report at Fort Mason; then we either go across the Bay to Outer Harbor, Oakland,— [8]

Q. Yes.

A. —and we have no definite spot to go to. It is different piers, wherever the crane is, or whatever ship needs the material that we have to load, then we are alongside that particular ship.

Q. When you went to Fort Mason in July of 1950 in the morning and reported to work, to whom did you report?

A. We report to the dispatcher there. We have a regular dispatcher.

Q. I see. And the dispatcher would tell you, "Now, this morning, fellows, go to Pier (so-and-so)"? A. That's right.

Q. To handle the rig for such-and-such a job?

A. That's right.

Q. Is that the way it would work?

A. Yes, sir.

(Deposition of Cecil Bailey.)

Q. And Mr. Cunningham was in charge of this dispatching office?

A. No, no, he wasn't. He is just in charge of the mechanical parts aboard the——

Mr. Ferguson: Now, Mr. Resner, I believe that this man is your witness, and I would request that you not be so leading, he being your witness.

Mr. Resner: I am not leading him.

Mr. Ferguson: I think you are.

Mr. Resner: This is by way of discovery.

Mr. Ferguson: You have not so noticed it and this deposition is not being taken for discovery purposes.

Q. (By Mr. Resner): Mr. Bailey, who was Mr. Cunningham?

A. I think he is the Port Engineer there. [9]

Q. The port engineer? A. Yes.

Q. Just what did he have to do with your work?

A. Well, he had the job of hiring us and getting the special rigs in operation.

Q. I see. And Captain Voortmeyer—Was that the name? A. Yes.

Q. Who was he, again?

A. I think he is the Port Captain down there.

Q. The Port Captain. Were there any other men at the office at Fort Mason who had any direction over your work in July of 1950?

A. Not that I know of, outside of the dispatchers who would tell us where to go.

Q. And do you know the names of the dispatchers at that time? A. No, I don't.

(Deposition of Cecil Bailey.)

Q. What relationship did Mr. Cates have to your work at that time?

A. He was the foreman.

Q. He was the foreman? A. Yes.

Q. Was he known by any other title?

A. No, not that I know of.

Q. Would he be known by the title of a Whistle Man or Signal Man or something of that kind?

A. Well, he is the foreman. He gives me the signal. He is the signal man and he is the foreman of the rig.

Q. I want to direct your attention to July 28 of 1950. Do you recall that day? A. Yes.

Q. Were you employed by the Army on that day? A. Yes, sir. [10]

Q. In what kind of a job?

A. Operator. Crane operator.

Q. What crane did you operate?

A. The BD-3031.

Q. That is the name of the crane, is it?

A. Yes.

Q. The number of the crane? A. Yes.

Q. What type of crane is it?

A. It was a Dravo.

Q. Say that again.

A. It was a Dravo. It is put out by the Dravo people. It has the blueprints on there that show that it is that particular rig.

Q. Would you spell the name for us?

A. Well, it's Dravo. There is no name on it.

Q. Just like it sounds? A. Yes, sir.

(Deposition of Cecil Bailey.)

Q. Now, was this crane attached to anything or affixed on anything? Was it a floating crane?

A. A floating crane; yes, sir.

Q. And what kind of a waterborne structure was it carried on?

A. It was just carried on a barge.

Q. On a barge. On July 28, 1950, where did you go aboard that barge?

A. Frankly, I don't know if we were over there all night or we moved over there that morning. I don't know if we moved alongside of that ship at that particular day or the day before. I just don't remember that.

Q. Well, do you recall at what place you got aboard the barge?

A. I'm not sure whether we went aboard at Oakland Army Base or over at Alameda.

Q. I see. Mr. Bailey, how did you get from Fort Mason to Alameda or Oakland?

A. We traveled—The Army furnishes the [11] transportation by bus.

Q. Army bus?

A. Or sometimes we go over on a towboat.

Q. I see. You either ride over in the Army bus or on the towboat? A. That's right.

Q. What kind of a towboat is it?

A. Well, it is a regular Army towboat.

Q. Does it tow the barge?

A. Yes, when it is needed.

Q. Do you recall that towboat towing this barge

(Deposition of Cecil Bailey.)

to the scene of this work on the day of the accident? A. No, I don't.

Q. Or the day before? A. No, I don't.

Q. Was the barge stationed alongside the Shawnee Trail when you came aboard the barge?

A. I'm not sure at that particular day that this happened.

Q. I am talking about the day of July 28, 1950.

A. Yes, I am not sure.

Q. Do you remember an accident on that day?

A. Yes, sir.

Q. Do you know at what hour of the day the accident occurred?

A. Yes, sir. Between 11:00 and 12:00, I believe.

Q. That is, at the noon hour?

A. Between 11:00 and 12:00.

Q. Well now, where was the Shawnee Trail docked at the time? A. It was in Alameda.

Q. What pier?

A. I don't know the number of the pier.

Q. Do you know Army Transit Depot No. 3?

A. I don't know if there are three or four. I know it was over in Alameda. [12]

Q. Do you know that pier?

A. No, I don't.

Q. Do you know at what pier the Shawnee Trail was docked?

A. No. I know it was in Alameda there, by the Naval Supply there, whatever they call it. I don't know. There are no numbers on the pier that I recall.

(Deposition of Cecil Bailey.)

Q. Was one side of the Shawnee Trail docked against the pier?

A. Docked against the pier, yes.

Q. Do you remember how you got aboard the barge? A. No, I don't.

Q. No recollection at all?

A. No. We moved around so much on different jobs, that particular morning I am not sure whether they come in there that morning with the barge or the barge was there overnight. I'm not sure.

Q. Well now, where was the barge located with regard to the Shawnee Trail on this occasion?

A. It was tied alongside of the hull of the Shawnee Trail.

Q. On which side?

A. I believe it was the starboard side of the ship.

Q. And would that be the side that was to the open water?

A. That's right. We were on the offshore side of the ship.

Q. You were on the offshore side?

A. (Nodding affirmatively.)

Q. Well now, how would you get aboard the barge under those circumstances?

A. Well, you would come over the ship and down on the barge.

Q. What means of getting aboard the ship did you employ? [13]

A. I just got through telling you awhile ago, sir, that I don't remember when we came aboard

(Deposition of Cecil Bailey.)

the barge whether we came aboard in Oakland and took the barge over that particular morning or not.

Q. You don't remember whether you rode on the barge to the scene of the job—

A. That's right.

Q. —or whether you crossed the vessel and then descended to the barge?

A. That's right. Because we have moved around so much, that particular day I don't know whether we took the barge over there that particular morning that we done that work or we had the barge there the night before. I'm not sure on that.

Q. How big a barge was this, Mr. Bailey?

A. Well, it's capable of 65 ton.

Q. What are its dimensions?

A. 65-ton weight.

Q. What length and what width?

A. I don't know if it is 90 feet or not. I'm not sure of the dimensions.

Q. How high does the deck of the barge sit off the water? A. I'm not sure of that either.

Q. Do you know approximately?

A. Oh, I would judge about five feet, I believe. That is, the deck of the barge.

Q. The deck of the barge. At what part of the barge is the crane located?

A. I think it's off center. That would be a little on one end of the barge.

Q. How high is this crane or derrick?

A. Well, we have a 90-foot—96-foot boom on

(Deposition of Cecil Bailey.)

there; and the [14] height of the boom from the deck—When the boom is real high, I don't know exactly how high it is from the deck of the barge.

Q. You say it is a 96-foot boom?

A. Somewhere around in there, according to the blueprints. That is, from one block to the other.

Q. You are the crane operator?

A. That's right.

Q. On this occasion where did you sit, or where was your station?

A. I sat up in the cab. That's a little bit above the engine room. It's about, I would say, oh, 30 to 35 feet from the deck of the barge.

Q. Above the deck of the barge?

A. Yes, sir.

Q. Well now, with regard to the Shawnee Trail on this occasion, where was your cab or station with relationship to the deck of the Shawnee Trail? Were you above it or below it?

A. I was above the deck of the Shawnee Trail.

Q. Could you see the deck of the Shawnee Trail?

A. I could see this side (indicating). I couldn't see what was going on the other side, because they had all that mechano structure there.

Q. When you say "this side," you could see the offshore side? A. The side that I was on.

Q. That was the side that you were on. You couldn't see the inshore side because of the mechano structure?

A. Well, I could see the inshore side.

Q. You could see that? A. Yes.

(Deposition of Cecil Bailey.)

Q. On this occasion, what time did you get aboard the barge that [15] morning of July 28, 1950? A. I'm not sure.

Mr. Harrison: I will object to that as being asked and answered. He has said he doesn't remember when he got aboard the barge, whether he rolled over on it or crawled across the ship to get on it.

Mr. Resner: Your objection is in the record.

Q. (By Mr. Resner): What time did you get aboard the barge that morning of July 28, 1950?

Mr. Ferguson: Wait a minute. I instruct the witness not to answer.

Mr. Resner: You can't instruct the witness.

Mr. Ferguson: If I appear for him?

Mr. Resner: Are you appearing for him?

Mr. Ferguson: He is an employee of the United States government.

Q. (By Mr. Resner): What time did you get to work that morning?

Mr. Ferguson: I object to it.

Mr. Resner: You mean to tell me that it is not a proper question to ask him what time he got to work that morning?

Mr. Harrison: It has been asked and answered.

Mr. Black: No. He said he didn't know what time he got on the ship.

Mr. Resner: I am asking him what time he got to work that morning.

Mr. Harrison: He has answered that he doesn't remember. Go ahead. [16]

(Deposition of Cecil Bailey.)

Q. (By Mr. Resner): What time did you go to work on the Army Base?

A. You see, we have different times. Sometimes we are called in early and sometimes we ain't, and those things is one day or another; and this one particular day, I don't remember what time I went to work that morning or what time we were called in. Sometimes we are called in a half an hour early or an hour early. On that particular morning, I don't know.

Q. How long had you been working when the accident happened?

A. I believe we were in operation for a month. I am not sure.

Q. No. On the morning in question, how many minutes or hours had you worked when the accident happened?

A. Well, we worked until—I believe the accident happened around between 11:00 and 12:00. I'm not sure. I don't know the exact time we started.

Q. Do you know approximately how many hours or minutes you worked—

A. No, sir; I couldn't.

Q. —aboard the barge before the accident happened?

A. No, sir; I don't. Not that particular day, no.

Q. Did you say that you had worked this barge for a month?

A. We got it in operation. I believe it was in operation—I'm not sure. I believe it was in operation a month before the accident.

(Deposition of Cecil Bailey.)

Q. I see. And during the month before the accident that you operated the barge, did you work on it under the same circumstances that you did on the day of the accident? [17]

A. The same circumstances; yes, sir.

Q. Were you ever under the situation where you would join the barge which would be bringing planes down from up the River, towed down?

A. I don't know what you mean, sir.

Q. Were you aboard that barge when it was towed into its station alongside a vessel by a tug-boat?

A. Occasionally, yes. Sometimes we have; yes, sir.

Q. And from what places would you start with the tug on those occasions?

A. It was wherever the barge was; wherever it was located the night before.

Q. Around the Bay? A. Yes, sir.

Q. Would you ever stay on the tug or the barge overnight?

A. No. We have two shifts on there.

Q. 8- or 12-hour shifts?

A. No. We work eight and ten hours.

Q. I see. At the time of the accident what kind of cargo were you working?

A. We were handling those jet airplanes.

Q. And where were the jet airplanes located on the barge?

A. They were on a service barge alongside of us, on the offshore side of us.

(Deposition of Cecil Bailey.)

Q. Another barge alongside of you?

A. Yes.

Q. Were there any planes located on your barge? A. No, sir.

Q. Did you see the service barge with the jet planes on it being brought into station alongside of you, or was it there when you [18] came to work that day?

A. I am not directly sure on that question either.

Q. Do you know how many planes were on the service barge that you were to load on July 28, 1950?

A. Either twelve or thirteen; I'm not sure there.

Q. Do you know how many jet planes you had put aboard the Shawnee Trail before the accident?

A. I believe it was twelve.

Q. You had already put twelve aboard?

A. Yes, sir. Or I think that that was the twelfth one that went aboard. I'm not sure.

Q. Would you please explain to me, Mr. Bailey, just how this floating crane operates in connection with loading a plane aboard a vessel?

A. Well, I take orders from the boss, that is, you call him a whistle man. He gives me the signals to pick the plane up and take it aboard the ship.

Q. Who would that be?

A. Mr. Charlie Cates.

Q. And where would his station be located?

(Deposition of Cecil Bailey.)

A. He would be aboard the ship.

Q. The Shawnee Trail? A. Yes, sir.

Q. At the rail?

A. Well, he would be within sight of me. I'm not sure. He doesn't always be at the rail.

Q. I see. Go ahead and explain the operation.

A. I pick the plane up, proceed across the ship with it, and boom down and put the plane in the position where they wanted it. [19]

Q. Now, who would hook onto the plane on the service barge?

A. The—I'm not sure on that question, who we had hooking on on that particular day.

Q. Was it another Army employee, part of your crew?

A. I am not sure whether the Army employees were hooking on or not. I'm not sure on that.

Q. How many Army men did you have aboard your floating barge and crane?

A. We had two. Two slingers and the foreman and myself. Four altogether.

Q. What do you mean by the "slingers"?

A. They are riggers. They move the barge around and take care of the slings and the equipment aboard the barge.

Q. Do you remember their names?

A. Yes, I know their names.

Q. Would you state them?

A. I work with them.

Q. I beg your pardon?

A. Yes, I know their names. I work with them.

(Deposition of Cecil Bailey.)

Q. Will you give me their names?

A. I want to make sure that they were on there at the time. I'm not sure exactly which. We had laid some guys off before that. I am not sure which slingers were there at that time. So therefore I wouldn't like to make a statement on their names.

Q. Can you give me your best recollection, Mr. Bailey? A. Well, I'm not sure, sir.

Q. The crew consisted of four: you, the whistle man or boss, who was Cates, and these two slingers, as you called them? [20] A. Yes.

Q. At what part of the plane is the hook-on made?

A. Well, I think there is—I think the hook-on was made on the body of the plane. That is, it's made on the body of the plane. That is, up on the top, just on one side of the fuselage—if that is what you call it.

Q. How many hooks are there?

A. There are three.

Q. Or how many lines down? A. Three.

Q. Three. Two on the body and one on the tail? A. Similar to that; yes, sir.

Q. And you don't recall who hooked on on the day of this accident? A. No, sir; I don't.

Q. During the month that you had had this barge and crane in operation, who had been doing the hook-on?

A. Well, we had—There was one slinger by the name of Eddie Sennett, and I don't know the other guy's name.

(Deposition of Cecil Bailey.)

Q. Well, in the month that you had been working this barge and crane, Mr. Bailey, had your slingers also been hook-on men?

A. No. They don't touch any equipment on any of those service barges. They are not supposed to hook on.

Q. Do the service barges come down with personnel aboard them?

A. No. They get their men from aboard the ship.

Q. On the service barges? A. Yes, sir.

Q. Well now, do you recall the plane that was involved in the accident, Mr. Bailey?

A. I don't recall the particular plane; no, [21] sir.

Q. Well now, do you recall that plane being hooked on, or being brought up and over and aboard the ship and landed?

A. Yes, I recall that.

Q. Did you get your signals to do that from Mr. Cates? A. Yes, sir.

Q. That is, to lift it, carry it over and drop it down; is that right? A. Yes, sir.

Q. Well now, would you tell me, Mr. Bailey, in your own words just how the accident happened?

A. Well, I picked the plane up as the signal was given and raised it up and got it high enough to clear the rigging on the ship, took it over to where they wanted it and lowered the plane in the position they wanted it, which was about two to two and a half feet from this landing platform where

(Deposition of Cecil Bailey.)

they were going to land it, and it held there for about three to four minutes. Then I got a signal from Mr. Cates, which was four whistles, to boom down; and proceeding to boom down, I put the auxiliary, which the plane was slung from,—put the auxiliary friction in so I could hold the load in one position and to boom down at the same time, in other words, to keep the plane on the same level and float the plane where he wanted it. So by pulling the friction clutch and releasing the brake that the load was hung on, in other words, the friction holds the load. I pulled the friction in in order to hold the load, and as I proceeded to boom down I looked out the window to get a better look to see that the boom was away from the gear, that is, the ship's gear, the stays and what-have- [22] you; and as I reached out the window, I had a pair of coveralls—I was working down below, oiling the engines—and the sleeve of the coverall caught on the friction and I pulled the friction forward; and as it done that, the plane dropped the distance of two and a half to three feet, and I immediately pulled the friction back on and I held the plane before it took its full weight.

Q. Now, you say that you were looking out the window?

A. I went to—I went to look out the window; in other words, to get a better look. And as I did, my sleeve caught on the friction and released it.

Q. Were you trying to open the window, Mr. Bailey?

(Deposition of Cecil Bailey.)

A. No, sir. The window was already open.

Q. And was this the window on the side that faced the vessel?

A. It is the window directly in front of me.

Q. Didn't you have a good view of the plane you were landing?

A. There was a lot of ship's gear. In other words, the overhead of the cab isn't all glass. In other words, I look up to see that the boom is clear of the rigging.

Q. You mean the crane boom?

A. The crane boom; yes, sir.

Q. On your barge? A. That's right.

Q. And you were going to look out the window to see that that was clear of the ship's rigging?

A. Yes.

Q. Did you have to look out the window in order to get a good view?

A. I do occasionally. Sometimes if the foreman overlooks things, I look, too.

Q. I see. This friction lever that you speak of was the lever [23] which held the plane in place; is that right? A. That's right.

Q. And how far from where you sat from your chest would this friction lever be?

A. It would be approximately about here (indicating).

Q. Would you estimate that distance?

A. Oh, I would say not over two feet.

Q. What do you say you struck the friction lever with?

(Deposition of Cecil Bailey.)

A. With the sleeve of my coveralls. It hooked in the friction lever and released it.

Q. What kind of coveralls were you wearing, Mr. Bailey? A. Regular khaki coveralls.

Q. I see. A. Army issue.

Q. And could you draw for me a sketch of the friction lever?

A. Well, it's—This is about the length of the lever here (indicating). This pulls this way (indicating).

Q. You are indicating toward you?

A. Yes.

Q. The little—

A. It is like a friction valve.

Q. This little object that you have drawn here?

A. Yes.

Q. Will you label that. Write down what it is.

A. Well, that was the auxiliary hoist, and here is the—

Q. Which is the auxiliary hoist, Mr Bailey?

A. This one here (indicating).

Q. Do you want to write "auxiliary hoist"?

A. And the main hoist. This "EX"—that is what is on the auxiliary hoist. [24]

Q. "EX" is on the auxiliary hoist?

A. That's right.

Q. And that is the one on the lefthand side of the sketch here? A. Yes.

Q. Is this oblong object you have drawn the panel board?

A. No. That is your friction, the front for this

(Deposition of Cecil Bailey.)

particular hoist. In other words, this is the main hoist and the boom hoist (indicating).

Q. Do you want to mark those as they are marked? A. Yes.

Q. Now, tell us again so that we won't have any question about it. "EX" is what?

A. Auxiliary hoist. That is what we have on the auxiliary hoist.

Q. And its function is what?

A. They call it the "whip." We call it the "whip." And this is the main hoist and the boom (indicating).

Q. What is the function of the auxiliary hoist? What is it supposed to do?

A. Well, the idea of the auxiliary hoist is, it's a small load line. We are not supposed to put on over fifteen ton.

Q. I see. And "M" is the main boom?

A. Yes, that is the main hoist.

Q. And what do you carry with that?

A. About 65 ton.

Q. And you have got that marked "M." And what are these next marks you have here, Mr. Bailey? A. That is the boom.

Q. Oh. You have "Boo." A. Yes. [25]

Q. You want an "m" there, don't you?

A. Well, it could be.

Q. And what is it supposed to be?

A. That is the boom.

Q. The boom? A. That's right.

Q. All right. Now, on which lever did you catch?

(Deposition of Cecil Bailey.)

A. Caught on the whip over here.

Q. You caught it on the whip? A. Yes.

Q. Is that the lever that is to your left as you face it?

A. Yes. As we face it, it is on my left.

Q. And would you tell me again, then, what you had it on for at the time of the accident?

A. I always put that on in case he wants to hold the load. In other words, in order to hold a load the boom is put down by a mechanical brake. That is a mechanical brake on this side (indicating). You see, you lower the boom on a mechanical brake, and this auxiliary hoist has to be on in order to raise the load as the boom is lowered down.

Q. Are there any foot brakes?

A. We have two foot brakes; yes, sir.

Q. Do you use them?

A. We do. But you have to take the foot brake off when you put your auxiliary hoist on in order to move the machinery. In other words, you lower it down or you raise it.

Q. So we will get your station in this cab right, were you at right angles to the vessel's side or did you face the vessel's [26] side as you were loading this plane? You yourself.

A. Well, I was practically—Well, I wasn't directly across the ship. I think I was veered a little bit on the right. I was more centered on the right of the ship, in other words. I was more right than I was left. I wasn't directly across the ship.

(Deposition of Cecil Bailey.)

Q. Well now, you and I are facing each other here, Mr. Bailey.

A. I would be in the position that that gentleman (indicating Mr. Magana) is sitting.

Q. Mr. Magana. You were at an angle?

A. Yes.

Q. About a 45-degree angle to the ship. But these levers were right in front of you?

A. Yes, sir.

Q. Is that correct?

A. Well, I am talking about the position of the crane at the same time as I was sitting.

Q. Yes, that's right. The crane would be at that angle? Toward the ship, that is.

A. Yes.

Q. Is that right?

A. Yes.

Q. And you, therefore, and these levers in front of you would be at the same angle?

A. That's right.

Q. You said that the signal to drop the load was four whistles.

A. Four whistles is to boom down.

Q. Boom down?

A. That is to boom down.

Q. What are the whistles to hold?

A. You see, whenever he gives me four whistles to boom down, when I have got a load on there, I get ready to boom down. In other words, I put the auxiliary hoist, or put the friction on, [27] whichever hoist I am using.

Q. You had already done that? You had already done that at this time?

(Deposition of Cecil Bailey.)

A. Yes. And that holds the load, see. Now, before I got ready to boom the load down, I proceeded to look out the window to see that the boom was clear of all running gear, that is, stays or what-have-you there. And as I done that, my sleeve caught on the friction lever and released it, and I pulled it back on immediately.

Q. Give me the other signals besides the four whistles that the whistle man would use.

A. Well, the order of a procedure like that: he would give me four whistles to boom down, and I would boom down; and while I am booming down, he would give me one signal to raise the load.

Q. One whistle? A. Yes.

Q. To raise the load? A. Yes.

Q. What are——

A. Or if he could see me, he would give me a hand signal to pick it up.

Q. What are the whistles to carry the load from the service barge up and then over the side of the ship? A. One whistle.

Q. From Cates, the whistle man?

A. No. They would give signals on the service barge. Whoever was working there would give them.

Q. They would give you the whistles there?

A. They would either give me a whistle or a hand signal.

Q. Oh, I see. To take it up after it was hooked on? [28] A. Yes.

Q. And was there any particular signal to bring

(Deposition of Cecil Bailey.)

the load over from the service barge to the deck?

A. No. Usually I would pick it up, bring it around, and clear the rigging myself.

Q. And would the whistle man direct you as to where to set it down on the ship's deck?

A. Yes.

Q. And then where would the whistle man stand at that particular time?

A. Well, there was no definite spot for him to stand. He would be in the position to watch the plane as it come over the ship, to be sure that it wasn't going to hit anything, and he would give me a signal, if it did—before it did.

Q. Cates, the whistle man, was the man who gave you all your orders? A. Yes.

Q. Did anybody else give you orders?

A. No.

Mr. Resner: Mr. Ferguson, do you have photographs of the crane?

Mr. Ferguson: No, I haven't.

Mr. Resner: Do you know whether they have been taken?

Mr. Ferguson: Personally, I don't.

Mr. Resner: I assume you will have no objection to furnishing us with them or permitting us to take pictures. Or do you want us to go and get an order?

Mr. Ferguson: We can talk that over.

Q. (By Mr. Resner): Can you describe that crane in any more [29] detail by name, number and description, Mr. Bailey, than you already have?

(Deposition of Cecil Bailey.)

A. No, I can't.

Mr. Black: That number appears right on it?

The Witness: It appears right on the crane.

Q. (By Mr. Resner): It appears right on the crane? A. Yes.

Mr. Black: Is that crane always affixed to the same barge?

The Witness: I'm not sure whether that was the number before or not.

Mr. Black: I mean, has it been ever since?

The Witness: Ever since it has been the same; yes, sir.

Mr. Resner: Let me ask one or two more questions, Mr. Black.

Mr. Black: Excuse me. I was just trying to develop that.

Mr. Resner: It is perfectly all right, John. I just want to finish this, and I am practically through now.

Q. (By Mr. Resner): Do you know whether that barge was U. S. Army BD-3031?

A. What was that number again, sir?

Q. BD-3031.

A. That is BD-3031. I said it.

Q. That was it?

A. That was the number on it.

Mr. Ferguson: "BB" or "BD"?

The Witness: BD.

Q. (By Mr. Resner): BD-3031. That was it, wasn't it? A. Yes, sir.

Q. Where did that number appear?

(Deposition of Cecil Bailey.)

A. It appeared on each side of the barge—on each side of the cab. [30]

Q. You had worked on this barge on a number of days before the accident, hadn't you? The same barge.

A. Yes.

Q. And this crane was affixed to that barge?

A. Yes.

Q. In other words, they didn't move it from that barge to another barge?

A. No.

Q. Did you keep a time record in July of 1950? That is, a timebook as to where you worked and what jobs you worked on.

A. No. The foreman. I have nothing to do with that whatsoever.

Q. But Cates keeps such a timebook?

A. He has the timebooks and he knows the hull number of the barge. That is his. I have nothing to do with it.

Q. He would know where you went to work and when you went to work; is that right?

A. He would know more of the details than I would. He is in complete charge.

Q. How far did you say the plane dropped, Mr. Bailey?

A. Approximately two to two and a half feet.

Q. Did you see it strike Mr. Luehr?

A. No, sir. I didn't see anybody around the plane at all. In fact, I didn't know there was anybody hurt until the plane was raised up, and until a minute or so after the plane was raised up I never knew there was anybody hurt.

(Deposition of Cecil Bailey.)

Q. Can you describe the speed of the drop of the plane at that time? A. No, I couldn't.

Q. Do you know how much those planes weighed? A. I am not sure of that either.

Q. Do you know approximately?

A. I know they are awfully [31] light compared to the equipment, the rig.

Q. Do you know approximately how much they weighed? A. No, sir; I don't.

Q. After your sleeve had caught the lever and released it, causing the plane to drop, just what did you do to stop it?

A. As my sleeve caught in the friction, I pulled it right back on again.

Q. You grabbed ahold of that same lever and pulled it back on? A. Yes, sir.

Q. Were you looking out of the cab window at the point where you got your sleeve caught on the lever?

A. I was looking right out the cab window; yes, sir.

Q. What were you doing with your hand at the time that you were looking out the window that caught on to the lever?

A. I was putting it on the ledge of the window to look out. In other words, I took my hand and put it on the ledge of the window to look out.

Q. Which hand was it?

A. This hand (indicating the left hand).

Q. The left hand. Are you right- or left-handed?

(Deposition of Cecil Bailey.)

A. No, sir; I am right-handed. I think this is my right hand.

Q. What hand did you use to operate the levers?

A. I used my right hand on the boom levers.

Q. I see. Well, did you use your right hand on the other levers too? What did you call the middle one, again? The main hoist?

A. The main hoist. I used my left on those there. [32]

Q. What did you use on the "EX"?

A. I used my left.

Q. Do you want to initial this, Mr. Bailey and we will offer it for identification on the deposition.

A. Initial what?

Q. That piece of paper. A. Initial it?

Q. Yes. What are your initials? C. B.?

A. Yes.

Mr. Resner: Mr. Conklin, I will hand you this sketch and ask you to mark it for identification on this deposition.

(Freehand sketch drawn by Witness Bailey was marked for identification Libelant's Exhibit No. 1.)

Mr. Resner: Those are all the questions I have at this time.

What procedure do you gentlemen want to employ to examine the witness? You are impleaded, John, and I suppose Mr. Cooper, you are.

Mr. Harrison: We are the No. 1 respondent.

Mr. Resner: And the government has responded here. So go ahead.

(Deposition of Cecil Bailey.)

Cross-Examination

By Mr. Harrison:

Q. Mr. Bailey, you say that you have been operating cranes of various natures for twelve or fifteen years; is that right? A. Yes, sir.

Q. And have you ever had any other serious accidents? A. Never. [33]

Mr. Black: We will object to that upon the ground it is improper.

Mr. Resner: I object to that.

Mr. Harrison: I can cross-examine this witness.

Mr. Black: And we can also object.

Mr. Resner. You can cross-examine the witness but you cannot ask improper questions.

Q. (By Mr. Harrison): Mr. Bailey, this friction on the auxiliary hoist that you have spoken of is operated by air pressure, is it not?

A. Yes, sir.

Q. And when the friction is released, does the air pressure go out of it immediately or does it slowly go out?

A. Well, it goes out—When there is any strain on it, it goes out pretty well immediately.

Q. But isn't it true that the friction actually holds the drop of the load momentarily?

A. Yes, sir.

Q. So that it doesn't drop as though it were just a free drop? A. No, sir.

Q. Well, Mr. Bailey, in your opinion why were

(Deposition of Cecil Bailey.)

they using the derrick barge instead of the ship's gear on this?

Mr. Resner: I object to that.

Mr. Black: We object to that.

Q. (By Mr. Harrison): All right. What was the nature of the gear aboard the ship?

Mr. Black: If he knows.

Mr. Cooper: I object to it upon the ground that a proper [34] foundation has not been laid.

Q. (By Mr. Harrison): Did you see the gear aboard the Shawnee Trail?

A. I didn't see the gear.

Q. You saw the booms and what they had, did you not?

A. Well, all they had looked like to me like it was small hose booms. That was all I saw. They don't have gear on there like they do on the regular ship. They were small booms. I think they used them for gangways or the ship's hose for hooking up oil or something like that.

Q. Were the booms aboard the ship sufficient enough to load this cargo?

A. I don't think they were long enough, no, to reach from the ship to the barge and pick the planes up, no.

Q. Is it true that the derrick barge which you operated is more of a precision instrument than the ordinary booms aboard a tanker?

A. Yes, I would say that.

Q. And the loading of these planes requires quite a bit of precision, does it not?

(Deposition of Cecil Bailey.)

A. Yes, sir.

Mr. Harrison: I think that is all.

Q. (By Mr. Black): You just testified, Mr. Witness, that the friction, presumably the friction of the brake, will momentarily hold a load after the air has been released; is that correct?

A. The friction won't hold the load after the air is released, no.

Q. While the air is being released, then. Is that your testimony?

A. Yes. That when the friction is put into gear, in other words, it injects the air into the cylinders [35] and it holds the load.

Q. Yes. And this air is released how?

A. Well, it's released through a bypass through the bottom of the cab. In other words, it is released through an exhaust affair.

Q. And that leads directly to the friction lever upon which your sleeve caught; is that correct?

A. Yes.

Q. That bypass? A. Yes.

Q. And the air is expended immediately when that bypass is opened?

A. Well, it takes practically immediately, yes.

Q. For all practical purposes it is at once, isn't it?

A. Well, I would say not almost at once but fairly.

(Deposition of Cecil Bailey.)

Q. Well, is it more than a half a second?

A. Well, I can't—I can't state any time on it, no.

Q. Well, did it hold this load?

A. Yes. It holds any load that is fifteen ton.

Q. Did it hold the load up and from falling?
This so-called friction. A. Yes, sir.

Q. For how long?

A. Well, I had the brakes on all the time. In other words, the only time I put the friction in is when we are going to boom across the ship and hold the load.

Q. Yes.

A. Then you have to release the brake after the friction is in in order to raise the load and lower the boom.

Q. Well, how fast did this load drop? [36]

A. Well, I couldn't describe it. I'm not sure.

Q. Did you see it drop?

A. I just seen it after it got just about down to the bottom. In other words, the friction is already on, just put it on. In other words, it was released and put back on again.

Q. Then is it your testimony that you didn't actually see the airplane drop?

A. No, I didn't actually see it drop. No, sir.

Q. What do you mean by "exactly"? Did you see it drop or didn't you?

A. Well, I could see the plane just about when it hit; yes, sir.

Q. When it hit where?

(Deposition of Cecil Bailey.)

A. It seems like it hit something. I am not sure what it hit.

Q. Did it hit the deck?

A. I don't know what it hit.

Q. Now, I think you testified you went to work for the Army about July the 7th or 17th, 1950. Is that correct? A. Yes.

Q. And you are still employed by them?

A. Yes.

Q. Have you been employed by anyone else in the meantime or during that period?

A. You mean while I am working for the Army?

Q. Yes. A. No.

Q. Have you had any other employer since July the 7th or 17th, 1950, other than the United States Army? A. No.

Q. Now, you have related here or testified with respect to a dispatcher and a dispatching office that is located at Fort Mason. Are the people in that office employees of the Army? [37]

A. I believe they are. I'm not sure.

Q. Now, this crane, BD-3031, was the property of the United States Army, was it?

Mr. Ferguson: If you know.

A. I don't know whether it is or not.

Q. (By Mr. Black): Was there anything on it to indicate the ownership of it?

A. Outside of BD-3031.

Q. That's all that is on it; is that correct?

A. That is correct.

(Deposition of Cecil Bailey.)

Q. But it is used by the Army all the time, is it not? A. Yes.

Q. And it is still in use by the Army?

A. I think it is, yes.

Q. Now, you testified that you were above the deck of the ship in your station or at your station?

A. Yes.

Q. Were you above the mechano deck on the ship?

A. Where I was sitting I was above, I imagine fifteen to twenty feet.

Q. Above the top of the mechano deck; is that correct? A. Yes.

Q. What were your normal hours of work?

A. Well, we worked usually from 7:30 in the morning or 8:00 o'clock in the morning until 6:00 or sometimes 4:30.

Q. And would that be five days a week?

A. Five days a week; yes, sir. Sometimes six, seven days a week.

Q. Now, were you paid by the hour, the day, the week or the [38] month?

A. We are usually paid for a 40-hour week.

Q. You are paid for a flat 40-hour week?

A. Yes.

Q. Whether or not you work 40 hours, do you still get paid for 40 hours' work?

A. No. If we don't work, then we don't get paid.

Q. Then you are paid by the hour; is that correct?

(Deposition of Cecil Bailey.)

A. Well, I'm not sure on that question.

Q. Well, have you ever done less than 40 hours' work in a week while working for the Army?

A. No, I don't believe we have.

Q. Have you ever been paid by anybody other than the Army since you went to work for the Army? A. No, sir.

Q. Do you know the ownership of the barge from which these airplanes were being lifted? The so-called service barge.

A. The ownership of which barge?

Q. Of the service barge upon which these airplanes were located. A. No, I don't.

Q. Were they Army airplanes?

A. I'm not sure of that, sir.

Q. They were jet airplanes, were they not?

A. Well, I'm not sure whether they were jet. That's just hearsay on my part. I'm not sure of that.

Q. I see. Now, in the course of your work did you ever take orders from anybody other than Mr. Cates? A. No, sir.

Q. He gave you all your directions and orders; is that correct? [39] A. Yes, sir.

Q. To whom were you immediately responsible? Mr. Cates? A. That's right.

Q. Anybody else? A. No.

Q. Now, Mr. Cates is the man that you referred to in your direct testimony here as the whistle man; is that correct? A. Yes.

Q. They are one and the same thing?

(Deposition of Cecil Bailey.)

A. Yes.

Q. Now, did the Army have special slings and hoisting equipment for these airplanes?

A. I'm not sure whether they do or not, sir. I believe they come with the bridle already attached to them. I think——

Mr. Ferguson: Just state what you know and not what you think.

Q. (By Mr. Black): You are trying to recall. State your best recollection.

Mr. Ferguson: He can state what he knows and not otherwise.

A. I wouldn't know.

Q. (By Mr. Black): How many airplanes do you think that you have lifted in the course of a year?

A. I'm not sure, sir.

Q. Can you give us any estimate at all, sir?

A. No, I can't.

Q. Do you think that you have lifted more than a hundred?

A. I am not sure. [40]

Q. Do you think that you have lifted twelve?

A. I don't know.

Q. Do you know whether you have lifted twelve?

A. Yes, I know I have lifted twelve. Yes.

Q. I beg your pardon?

A. I know we have lifted a lot of planes over there.

Q. Do you know whether you have lifted any since then?

A. Yes, I know I have lifted planes since then.

Q. Do you know on how many occasions?

(Deposition of Cecil Bailey.)

A. I am not sure, sir.

Q. It might be only one?

A. We have loaded several planes since. I know that, but I don't know exactly how many.

Q. Now, you say that Mr. Cates will give you the four whistles to boom down? A. Yes.

Q. That was customary, was it?

A. That's right.

Q. And Mr. Cates was your foreman?

A. Yes.

Q. Now, who on these service barges will give you your orders to start up?

A. Well, it would either be Mr. Cates if he was in the vicinity there or seeing something wrong, or was waiting on a plane or something, he would give me the signal; but if they were ready all the time, why, usually the boys that hook on, they look around the plane and see if it is all clear, and they give me a hand signal.

Q. That would be one of the sling men?

A. Yes, it would be the sling men or the longshoremen, if they were there, or whoever was hooking on. [41]

Q. Do you know whether any longshoremen were there?

A. I'm not sure who was there this particular day.

Q. Then you don't know who gave you the signals on this particular day; is that correct?

A. That particular day I don't know, sir.

Mr. Black: I think that's all.

(Deposition of Cecil Bailey.)

Q. (By Mr. Cooper). Mr. Bailey, I am not sure that I understand this juggling operation you were attempting. You have testified that you received certain whistles which constituted directions to you as to what to do? A. Yes.

Q. Now, just what did you interpret those signals to mean that you were to do?

Mr. Ferguson: Which signal are you referring to?

Mr. Cooper: These whistles. First the four whistles and then the following single whistle.

Q. (By Mr. Cooper): What was your belief that those whistles were intended to direct you to do?

A. Well, the signal—You mean in order to pick the plane off the barge or avoid the ship?

Q. We will go down to the point, as I recall the testimony where you had hung the plane somewhere above the mechano deck. Is that right?

A. That's correct.

Q. Is that correct? A. That's right.

Q. And I think you testified that you had allowed it to rest there without movement some three or four minutes; is that correct? A. Yes. [42]

Q. And then you got four whistles?

A. Yes, sir.

Q. And then after that you got a single whistle?

A. No, I didn't get no single whistle.

Q. Then you got four whistles?

A. I got four whistles to boom down and float the load away from me; in other words, to float it where it was supposed to go.

(Deposition of Cecil Bailey.)

Q. And that operation, then, that you interpreted those whistles to direct you to do was to hold; that while you were lowering the boom——

A. Yes, sir.

Q. ——you were to nevertheless, by pulling up on what I will call the fall, maintain the level of the plane? A. Of the plane; yes, sir.

Q. I see. Now, had you ever performed that operation before? A. Yes, sir.

Q. Had you ever performed that operation on this day in connection with this ship?

A. You mean the day that this happened?

Q. That's correct?

A. Yes. We loaded those planes that day, yes.

Q. Do you mean to tell me that every plane you loaded that day, you performed that operation of loading in exactly this same way? A. Yes.

Q. That is, you let it come to rest for three or four minutes and then waited for a signal to boom down? Is that what you are telling us?

A. That's right. I am waiting for a signal. I don't know what kind of a signal he is going to give me, whether it is to boom down or lower the load or raise [43] the load.

Q. I think you misunderstood my question. My question was, Did you get the signals that required this precise operation on a prior occasion that day? That is, the operation I have in mind is lowering the boom and at the same time maintaining the level of the load. A. Oh, yes, sir.

Q. You had done it before?

(Deposition of Cecil Bailey.)

A. Yes, sir. I have done it before many times.

Q. I am talking about this particular day.

A. Yes, sir.

Q. How many planes had you loaded that day?

A. I believe it was twelve planes, I believe.

Q. And you mean——

A. Twelve or thirteen planes.

Q. You say “many times.” Do you mean as many as three or four times?

A. Well, we don't always have to float the load. Sometimes the load is in the right spot.

Q. I see. Well now, isn't this the truth of the matter: You don't recall whether you ever performed that particular operation in that way before?

A. We do that several times in any day we work.

Q. Then your testimony is that you think you probably did it before because you had done it on other jobs; is that right?

Mr. Ferguson: That was not his testimony. He is talking about this day that he loaded the twelve planes and that he had done this same operation similarly on the twelve planes.

Q. (By Mr. Cooper): Isn't it a fact that you don't remember whether [44] you did this same operation prior to the time of the accident on that particular day?

A. I just stated that I had done the same operation on those planes at that particular day.

Q. But you don't know how many; is that right?

(Deposition of Cecil Bailey.)

A. No, I don't know how many. I take a lot of signals and I am moving a plane in all directions, and I can't remember all the signals that was given on one day.

Q. I am confining you, of course, to the particular operation where you got it above the mechano deck and then attempted to comply with the boss' directions as to what you were to do with it, to be perfectly frank about it. Now, you don't remember whether you did that particular kind of operation before that day or not; is that right?

A. I have done the same thing before that.

Q. I am talking about this very day.

A. On that particular day.

Mr. Ferguson: I will object to that. The question has been asked and answered four or five times.

Mr. Cooper: I think the way he qualified it—

Mr. Harrison: You qualified it, Mr. Cooper. I don't believe the witness did.

Mr. Cooper: Read the question and answer, please.

(Question and answer read.)

Q. (By Mr. Cooper): How many times?

Mr. Ferguson: That question has been asked and answered [45] several times. The number of planes that he loaded. I object to it on that basis.

Mr. Cooper: All right. We will try it again, to see if his answer is the same as the one before.

Q. (By Mr. Cooper): How many?

A. I don't know for sure. Probably three or

(Deposition of Cecil Bailey.)

four times. I'm not sure. I take signals all day long. I can't remember all the signals that he has given in one day.

Q. That operation, as I get it, required lifting up on the cargo fall, I will call it,—Do you know what I mean by cargo fall? A. Yes.

Q. (Continuing): —lifting up on the fall and at the same time lowering the boom?

A. Yes, sir.

Q. That is, you had to do two operations at the same time? A. Yes, sir.

Q. And will you tell us again just how you managed that?

A. Well, in other words, to keep the load at the same level you have to put the friction in on the small fall, that is, the whip or the auxiliary. That's what the load was slung from. You have to put the friction in on that and lower the boom with the other hand, and keep it at the proper level as you lower it—at an even level.

Q. Well now, Mr. Bailey, what you attempted to do, then, was to hold that load, that is, to prevent the fall from running out; that is correct, isn't it?

A. Hold the load. [46]

Q. In other words, you held the fall just exactly where it was, or at least that is what you attempted to do; is that right? In other words, that there was no movement on the drum as far as the fall is concerned?

A. That is the fall on the whip, yes.

Q. I am not sure that I mean on the whip. You

(Deposition of Cecil Bailey.)

mean that that is similar to a drum arrangement which you revolve to let it up or take it up; is that right? A. Yes.

Q. So what you attempted to do was to hold that fall absolutely stationary, was it?

A. Yes.

Q. And at the same time lower the boom?

A. Yes. That would drift the load to where he wanted it.

Q. Now, as a matter of fact, in your experience didn't you find that if you lowered that boom and held the fall stationary, it would have the effect of lowering the load?

A. Not too fast, no. You heave the fall up at the same time. In other words, you keep the load at a certain level.

Q. I thought you just told us that you held the friction in so that you would hold the load where it was.

A. No. You put the friction in in order to raise the load as the boom is lowered.

Q. I thought you held it in sort of a brake arrangement so that the friction was on and held your drum.

A. No. When you put the friction in, you put that in for the purpose of raising the load and lowering the boom by manual brake. [47]

Q. Do you mean that? You put the friction on to engage it? A. Yes, sir.

Q. That is what you meant, then: to engage it?

A. Yes.

(Deposition of Cecil Bailey.)

Q. And not to hold it like you would hold it with a brake?

A. Well, you put the friction in and then use your power throttle to heave the load up while you are lowering your boom by manual brake.

Mr. Black: Pardon me. Off the record.

(Remarks outside the record.)

Q. (By Mr. Cooper): Now, Mr. Bailey, when you put what you called the friction on, which is an engaging gadget, did you have to hold it in place——

A. No.

Q. ——in order to keep from jumping out?

A. No, you don't have to hold it in place.

Q. Did it go into a notch?

A. No. It goes all the way over. It is inserted all the way over to one spot.

Q. It is inserted all the way over to one spot?

A. Yes, as far as it goes.

Q. I will ask you again. What keeps it in that place so that it goes all the way over to one spot?

A. Well, it stays there. I guess air pressure holds it down.

Q. You really don't know what the mechanical arrangement is, then; is that correct?

A. Well, it acts like——

Q. You said you guessed.

A. ——it is a regular lever like a valve. When you pull it to you, it stays in the direction [48] it is put in.

(Deposition of Cecil Bailey.)

Q. I thought you said you put it all the way over. Now you speak of pulling it to you. Which physical operation is it?

A. In other words, I pull the lever to me. That engages the air friction.

Q. I see. You pulled it to you?

A. Yes, sir.

Q. And that engaged it? A. Yes, sir.

Q. And is that the knob or the little lever that you caught your sleeve on? A. Yes, sir.

Q. How do you know you caught your sleeve on that, Mr. Bailey?

A. Well, as I put my hand through the window I could feel it. Then when I felt it, I pulled it right back.

Q. You mean you pulled it right back and still, in that fraction of a second, the load lowered?

A. Yes, sir. If it would have been any higher it wouldn't have hit the deck.

Q. Now, let's not try to reconstruct it. I am not asking you what you think happened. That, counsel will agree with me, is not admissible.

Then as soon as you felt your sleeve engage there, you pulled it right back; is that correct?

A. Yes, I did.

Q. And you weren't looking at the load that particular moment, though?

A. I was looking up at the dock to see if the boom was out of the way.

Q. But this movement of catching and pulling back on it was [49] practically instantaneous, was

(Deposition of Cecil Bailey.)

it? I mean, you were aware that you were doing a dangerous thing and you pulled it right back?

A. Yes, sir.

Q. And then I think in answer to Mr. Black's question you said you thought you saw it hit something after it had already fallen. Is that a correct statement of your testimony? A. No, sir.

Q. Tell us what is correct, then.

A. Well, I'm not positive if I just seen the plane before it landed or not.

Q. I see. At any rate you do know that when your sleeve engaged this little knob or lever, you were looking up at the gear on the dock?

A. Yes.

Mr. Cooper: That's all.

Redirect Examination

By Mr. Resner:

Q. Mr. Bailey, was that plane left on the Shawnee Trail or did you take it back and put it on the service barge? A. No, it was left on there.

Q. After this plane dropped was there a delay in your work? A. No. We went right ahead.

Q. Well, did you hear that the man had been hurt? A. I heard later on; yes, sir.

Q. How much later?

A. Well, I heard it at lunch time. A few minutes. Probably just before lunch I heard it.

Q. Well now, was there any period of time that

(Deposition of Cecil Bailey.)

elapsed between [50] the time the plane dropped and the time that you were told to carry on and move the gear around off the vessel and pick up the next plane?

A. No, I am not sure. I believe the only operation we got was to pick the plane up and after the man was hurt, I believe, and then we landed the plane, and then I think we went to eat later on. I don't think we done anything before noon. I am not sure.

Q. Did you actually lower the boom just before the plane dropped? A. No, sir.

Q. Were you trying to lower the boom?

A. I was going to lower the boom just before my hand caught this lever and released it.

Q. Did you lower the boom after?

A. No, sir. I didn't touch the boom at all.

Q. Although you had intended to lower the boom, you didn't do it?

A. No. I think they put the plane right there where it was. I am not sure.

Q. Had Cates given you the signal to lower the boom?

A. After that, I'm not sure whether we put the—Yes, we picked the plane up after the plane had dropped, and I'm not sure whether he swung me over or drifted the load or not after that on that particular lift.

Q. What is the signal for lowering the boom?

A. Four whistles.

Q. And that is the same for lowering the load?

(Deposition of Cecil Bailey.)

A. No, it isn't the same for lowering the [51] load.

Q. What is the signal for lowering the load?

A. It is two whistles for lowering the load.

Q. What is the whistle to stop?

A. One to stop.

Q. What is the whistle to pick up?

A. One to pick up. When he is lowering the load—We have signals between ourselves. When he is lowering the load or lowering the boom, a lot of times when the boom is lowering down he will give me a whistle, if he is looking at me, to raise the load a little. In other words, to try to keep it at the same level and boom down.

Q. He will give you a hand signal for that?

A. Or he will give me a whistle.

Q. One whistle?

A. Yes. To pick it up, if he is watching me.

Q. And what is the hand signal for picking up?

A. Up this way (indicating).

Q. You pulled your hand up with your index finger extended. Is that it? A. Yes.

Q. Is there a hand signal to "hold everything"?

A. Like this (indicating), yes.

Q. And you are leveling your hand off and shaking it from one direction to the other?

A. Yes.

Q. Is there a hand signal to pick up? The one you have given us. Is there a hand signal to drop the load? A. This way (indicating).

Q. With your index finger pointing down?

(Deposition of Cecil Bailey.)

A. Yes. [52]

Q. I see. And then it was when you went over to the side of the cab to put your left hand or arm on the cab window to look out, that your sleeve caught on this auxiliary lever and dropped the plane? A. Yes, sir.

Q. Did you actually get your hand or arm on the cab window?

A. Well, I guess when I pulled my lever I got it all the way and then I pulled the friction back.

Q. But you did get your hand and arm all the way on the cab window? A. Yes.

Mr. Cooper: I am going to object to that, counsel. This subject has been pretty thoroughly covered. And I want to object to counsel using leading questions to the point of telling the witness what the situation was, particularly at this stage of the game.

Q. (By Mr. Resner): Did you put your hand and arm exactly on the cab of the window?

A. Not my arm, no. I went to reach my hand on the window sill, and by doing that I tripped the friction clutch, by doing that, with the coverall of my sleeve which was hanging there.

Q. Did your hand get on the window sill?

A. I am not sure whether it did or not.

Mr. Ferguson: I will object to further questioning along this line of testimony. It is improper re-direct.

Q. (By Mr. Resner): Mr. Bailey, after this accident happened did you give the Army officials any written statement concerning it? [53]

(Deposition of Cecil Bailey.)

Mr. Ferguson: I object to that upon the ground it is improper redirect.

Mr. Resner: You can answer.

Mr. Ferguson: It is improper redirect.

A. Well, I don't care to answer it if counsel says not.

Q. (By Mr. Resner): What is that, Mr. Bailey?

Mr. Ferguson: You can answer the question. Go ahead and answer it.

A. Yes, I give the Army a statement. Yes, sir.

Q. (By Mr. Resner): How many?

A. Just the one statement.

Q. Did you give anybody else besides the Army a statement? A. The FBI.

Q. Anybody else?

A. That's all. And the statement I gave them is actually the statement I am giving you.

Mr. Black: Were they written statements?

Q. (By Mr. Resner): That is, did you sign them? Were they reduced to writing or typing, and did you sign them?

A. They were all typed.

Q. And did you put your name on them?

A. I'm sure. Yes, I did, I believe.

Q. The actual drop of the plane was caused by your sleeve catching in this auxiliary lever?

Mr. Cooper: Well, I object to that.

Mr. Harrison: I object to that.

A. I am not sure, sir.

Q. (By Mr. Resner): I beg your pardon, [54] sir?

(Deposition of Cecil Bailey.)

Mr. Ferguson: Just a minute. We want the objections before the answer goes in, Mr. Resner.

Mr. Resner: Go ahead, Mr. Ferguson.

Mr. Ferguson: The objection is being made by Mr. Cooper, and he ought to be afforded the opportunity to make his objection.

Mr. Resner: He made his objection.

Mr. Cooper: No.

Mr. Resner: Didn't you conclude your objection?

Mr. Cooper: I object upon the ground that this question has been covered on direct by you and that the record, I believe, is clear at this point as to what actually took place, and this calls for a conclusion——

Mr. Resner: And what is your answer?

Mr. Cooper: ——whether it caused it or didn't cause it.

Mr. Ferguson: And I join in making the same objection, and it has been gone over. And if you insist upon repeating questions, I will suggest to the witness that he should not answer. And he is an employee of the United States government and the United States Attorney, being here, represents all employees of the United States government.

Mr. Resner: So you are representing Mr. Bailey on this deposition?

Mr. Ferguson: Certainly. Certainly.

Mr. Resner: As long as he is acting at your behest, Mr. Ferguson—— [55]

Mr. Harrison: We did not call him as a witness.

(Deposition of Cecil Bailey.)

Mr. Resner: It doesn't change the fact.

Mr. Ferguson: You have gone over it thoroughly.

Mr. Resner: It doesn't change the fact. We are not children and none of us was born yesterday. We all know what is going on here, Keith.

I haven't anything further.

Mr. Harrison: I have one further question.

Recross-Examination

By Mr. Harrison:

Q. Mr. Bailey, at the time of this accident was there any mechanical failure of the derrick?

A. No, sir.

Q. Was there any defect in the mechanics of the derrick barge, to your knowledge?

A. Not to my knowledge.

Mr. Cooper: I will object to that because the proper foundation has not been laid and it calls for the conclusion of the witness.

Mr. Ferguson: He asked for his knowledge.

Mr. Harrison: I asked for his knowledge. I don't think the objection is good.

Mr. Ferguson: Is that all?

Mr. Resner: About the signing of the deposition. Where can you read and sign it?

The Witness: Can we get a copy of those things?

Mr. Resner: Your lawyer will have a copy. [56]

The Witness: We have a lot of material over there, war material that we are loading, and we are supposed to be back as quick as possible.

(Deposition of Cecil Bailey.)

Mr. Resner: You can't sign it today.

Do you want to waive the signature, Mr. Ferguson?

Mr. Ferguson: We will waive it.

Mr. Resner: Will you waive it, John?

Mr. Black: Yes.

Mr. Resner: Will you, "Coop"?

Mr. Cooper: Yes.

Mr. Resner: The signature is waived. You can type it up and file it, Mr. Conklin.

(Signature waived.) [57]

Tuesday, March 18, 1952—2 o'Clock P.M.

The Court: Proceed.

(Reading of the deposition of Cecil Bailey was completed by respective counsel.)

Mr. Harrison: I believe that is all of the deposition, your Honor, except we waived signature.

Mr. Resner: Your Honor, on behalf of the libellant, we subpoenaed two or three longshoremen. I believe they are in the Court now. We are not going to call them as witnesses because the facts are very well established and will be by Mr. Luehr's testimony, and in our judgment it would only be cumulative. However, the witnesses are here, and while I want to excuse them and will ask your Honor to have them excused, Mr. Harrison might want to call them, and if he does we have no objection.

Mr. Harrison: I have subpoenas for three witnesses. Can you tell me who these are?

Mr. Resner: I don't know who they are. I wonder if the longshoremen, if there are any in Court, will stand up? Will you tell us your names, gentlemen?

A Voice: Withers.

A Voice: Bennie Johnson.

A Voice: Padula.

Mr. Resner: Do you want to call any of them, Mr. [132] Harrison?

Mr. Harrison: May I take a look for a moment? I think I would like to call Mr. Johnson.

Mr. Resner: This is a little bit out of order, but I thought to expedite the matter and save the witnesses from coming back, it might be proper.

Mr. Harrison: I would like to call Mr. Bennie Johnson, if I may.

Mr. Resner: This is understood it is out of order, but is on Mr. Harrison's case, is that all right?

Mr. Harrison: I think it will be very brief, your Honor. I want to bring out one point that I think will contradict something Mr. Spurz has said.

Mr. Resner: But it is on your case?

Mr. Harrison: It is on my case, yes.

BENNIE JOHNSON

called as a witness for the Government, sworn.

The Court: What is your full name, sir?

A. Bennie Johnson.

The Court: Where do you live?

(Testimony of Bennie Johnson.)

A. 323 Haight Street.

The Court: What is your business or occupation? A. A longshoreman.

The Court: How long have you been so engaged? [133]

A. I have been working on the front ever since 1944.

Direct Examination

By Mr. Harrison:

Q. Were you employed aboard the USNS Shawnee Trail on June 28th, 1950? A. I was.

Q. And you have been here in Court? Do you recall the accident we have been discussing?

A. Yes, I was.

Q. The injury to Mr. Frank Luehr?

A. I was.

Q. Can you tell us where your station was at the time the plane dropped?

A. My station was, I was down on the lower deck when this happened, and I had stepped off the deck into the ship to get some water, and just by the time I got back, that is the time when this plane fell; and when I heard the noise I looked up and I just did run trying to get out of the way, because it scared me and I ran to get out of the way.

When I turned around and looked again, I saw this gentleman here was laying on the lower deck, then I turned around and walked to him to find out what had happened.

(Testimony of Bennie Johnson.)

Mr. Resner: He was pointing to Mr. Luehr.

Q. (By Mr. Harrison): Can you tell us whether or not there were any other men up on the mechano deck?

A. Well, there was some up there, but I don't know just [134] how many was up there at the present time.

Q. But there were some men there?

A. There were some of them up there.

Q. Can you remember where they were stationed on the mechano deck?

A. Not at the present time.

Q. You can't recall? A. No.

Q. Do you remember seeing Mr. Luehr, where he was?

A. Mr. Luehr, I don't know just where he was standing, but from where he fell he must have been standing to the inshore side.

Q. To the inshore side? A. That's right.

Q. Is it possible to tell whether he was standing in front of the plane—in front of the wing or behind the wing?

A. Well, when he fell, I don't know where he was standing, whether he was standing in the front or either in the back. When I saw him he was down on the lower deck.

Q. But you are sure there were other men on the mechano deck? A. That's right.

Q. At the time the plane fell?

A. That's right. [135]

Mr. Harrison: I think that is all.

(Testimony of Bennie Johnson.)

Thank you, Mr. Johnson.

Mr. Resner: I have no questions.

Mr. Kay: I just have a question.

Cross-Examination

By Mr. Kay:

Q. Mr. Johnson, did you work on some other job where they were loading planes on mechano decks? A. No, that is the onliest one.

Q. Wasn't there one other job where you were on the mechano deck?

A. Not to my knowledge. I think that is the onliest ship I worked on loading planes.

Mr. Kay: Thank you.

Mr. Harrison: Thank you. That is all.

(Witness excused.)

Mr. Harrison: If your Honor would bear with me a moment, I would like to see if I want to call Mr. Padula.

The Court: Very well.

Mr. Harrison: Yes, I would like to call Mr. Padula, if I may. [136]

FRANK PADULO

called as a witness on behalf of the Government.
sworn.

The Court: What is your full name?

The Witness: Frank Padulo.

The Court: Where do you live?

The Witness: San Francisco.

(Testimony of Frank Padulo.)

The Court: What is it?

The Witness: San Francisco.

The Court: Where?

The Witness: In the city.

The Court: Redwood City?

The Witness: No, city, in San Francisco.

The Court: What is your address?

The Witness: 284 Arleta Avenue.

The Court: What is your business or occupation?

The Witness: I have been working on the waterfront for many years.

The Court: How many years?

The Witness: About 20, 25, 30, I don't even remember myself.

The Court: I see. All right.

Direct Examination

By Mr. Harrison:

Q. Mr. Padulo, is that the way you pronounce it? [137] A. Padulo.

Q. Yes. Were you employed aboard the Shawnee Trail on June 28, 1950?

A. Yes, I was with the rest of the boys.

Q. On the day of this accident?

A. Yes, this accident.

Q. And you have been here in court and heard us discussing this accident?

A. Yes, I heard most of it, I got in the wrong room, I was listening downstairs, to something.

Q. I see.

(Testimony of Frank Padulo.)

Mr. Resner: He was directed to come to the wrong court.

The Witness: I got the wrong court, I got the wrong court, supposed to come up here and I was down below.

Mr. Resner: Apparently he was directed to Judge Goodman.

The Witness: 256 and supposed to be 338. I was down there listening.

Q. (By Mr. Harrison): Don't look at me, Mr. Padulo.

The Court: Make as many mistakes here as they do down on the waterfront.

The Witness: The way it looks, I was at the other one, and instead it should be here.

The Court: Don't let that bother you.

Q. (By Mr. Harrison): Do you recall the dropping of the airplane? [138]

A. Well, I was only there to steady the airplane.

Q. At the time the airplane dropped, what were you doing?

A. I was steadying on one of the ropes.

Q. The tag line? A. Yes, tag line.

Q. Where were you standing?

A. Right up, right do you call it, the mechano deck, whatever it is.

Q. Below the mechano deck? A. Yes.

Q. On the main deck?

A. Steadying the rope.

Q. You were on the main deck of the vessel steadying the rope? A. Yes.

(Testimony of Frank Padulo.)

Q. Attached to the airplane?

A. Attached to the wings.

Q. One of the wings of the airplane. How long had you been holding that rope?

A. Well, before they got—it was a little windy, steadying it for a few minutes anyway, I don't know exactly. Of course, nobody knows what was going to happen.

Q. Were there any other men on the mechano deck of the vessel?

A. A few, I didn't—we don't pay much attention. [139]

Q. Were there any men holding on to tag lines?

A. I guess, I got one of the lines, I don't know who got the rest.

Q. There were other men——

A. Everybody was trying to do his best to land the airplane.

Q. I see. Now, from your position on the main deck of the vessel could you see onto the mechano deck?

A. I was watching the airplane, steadying, which way the wind was whirling around.

Q. It was swinging?

A. A little, don't take much, a little breeze.

Q. A little breeze would swing it? A. Yes.

Q. Did you see any men up on the mechano deck?

A. Yes, I see the gentleman that got hurt.

Q. And how many were there? Were there any others?

(Testimony of Frank Padulo.)

A. Well, there was some, I think there was up in the—let me see, what you call it, facing right inside coming from the barge, and they set the blocks on the wheels, whatever—supposed to be blocks, supposed to set those blocks.

Q. And there were other men then on the mechano deck?

A. There, you know, around, have to move it out.

Q. When the plane came down everybody moved away?

A. You had to, it was right there.

Q. Do you know what Mr. Luehr was doing up there? [140]

A. One of the blocks where he was, the wheel, taking the wheels off, and had it on the block, trying to set one of those blocks on the plane.

Q. Yes. He actually had a block?

A. Yes, he was waiting, you know, the plane, supposed to set on that block.

Q. And do you remember whether or not he was actually, had a block or whether he was also trying to stop the plane?

A. Couldn't stop, because the plane supposed to stop so far from where it was supposed to rest.

Q. From your position on the mechano deck could he have helped you any from stopping that plane from swinging?

A. He was setting a block, a bunch in there, you know, trying to steady the plane, that is what happened.

(Testimony of Frank Padulo.)

Q. The plane, did it still have some motion, was it still moving a little bit?

A. The wind, you know, got so many men steady-ing it, you know, all around it, then when that happened it come, you know, everybody moved out.

Q. Now, do you remember whether there was anybody else—they need three blocks, don't they?

A. Yes, three blocks.

Q. Anybody else up there putting blocks under?

A. I think one, he was on the other side, and the other boys was on the other, and every-body—— [141]

Q. Could you see——

A. Well, because when it dropped——

Q. You remember——

A. I got out from the beams, some of the beams was kind of loose.

Q. Do you know how high the plane was above the mechano deck just before it fell?

A. Well, it was up about four or five feet.

Q. Four or five feet?

A. Yes, fell three or four.

Q. Was the distance between the landing gear and the block, or is that the distance between the wing and the mechano deck?

A. Well, you got the mechanical deck——

Q. Just a moment, would you talk slower?

A. I am in a mess, wasn't coming over here, because I got this thing this morning——

The Court: Sit back in the chair. Now, talk slower so he can get it down..

(Testimony of Frank Padulo.)

Q. (By Mr. Harrison): Now, tell us how high—think about what I am asking you—how high the wing of the plane was from the mechano deck?

A. Well, I am not exactly sure, could be three or four feet up, I didn't go up and measure, because I was down below the mechano deck, must be ten feet high, I didn't measure anything.

Q. Was the landing gear of the plane almost on the block? [142]

A. Yes, it was pretty close.

Q. It was pretty close?

A. He was setting the blocks under it.

Q. I see. Thank you, Mr. Padulo.

Cross-Examination

By Mr. Resner:

Q. Just a couple of questions. You know, there are lots of lawyers, we all have the right to ask you questions.

A. I didn't want to come in this mess.

Q. I don't think——

A. If you had notified me a couple of days, had to come this morning after I went to work.

Q. You don't have to worry about that, we know you have been working; relax.

Mr. Padulo, you saw Mr. Luehr, the man——

A. Yes, that is the same man. He fell off.

Q. Did you see the plane fall on him?

A. Well, I run away myself, otherwise it would have gone on me.

Q. You were on the main deck?

(Testimony of Frank Padulo.)

A. I was on the main deck, but the plane——

Q. Talk a little slower.

A. The plane didn't go down, just on top of the frame.

Q. It rested on top of the frame?

A. Yes. [143]

Q. But you were on the deck below under the frame? A. Under the frame.

Q. And the plane fell on the man, Mr. Luehr; the plane fell on Mr. Luehr who was on the frame?

A. Yes, that is right, the plane fell on him up under the plane.

Q. The plane fell right on him?

A. That is right.

Q. You say the plane fell how many feet?

A. Well, I didn't measure, two or three feet, because, you know——

Q. Would it have been as much as five or six, seven feet, too?

A. She comes down, that is all.

Q. Could the plane have fallen as much as five or six or more feet?

A. Well, I don't know, it was pretty close, because the plane—the plane was close to the blocks.

The Court: Didn't he say it could be five feet?

Mr. Resner: That is right, five or six feet.

Q. You didn't, you don't know whether it could be four or five feet? A. That is right.

Q. All right. You had a hold of the tag line?

A. Yes, I had one of them lines. [144]

Q. Steadying the plane?

(Testimony of Frank Padulo.)

A. Steadying the plane.

Q. Is that right? A. That is right.

Q. Mr. Luehr was up on the deck steadying the plane?

A. He was setting the blocks on the plane.

Q. Wasn't he also steadying the plane, holding it?

A. Well, the plane wasn't close to it, you know; I didn't measure it, how close to it, but it was pretty close.

Q. But the plane had stopped anyhow?

A. Yes, stopped, and then it went.

Q. The plane, and then it fell without any warning? A. That is right.

Q. Just like somebody cut the line?

A. That is right. Kind of bounced back.

Q. Bounced back and he bounced off onto the deck?

A. That is right. Probably if when the plane landed it was steady, he probably would have stayed there.

Q. But he was holding onto that plane, was he steadying it while getting ready to land it?

A. This block, and had to fix the block so the plane could rest.

Q. I understand he had to fix the block, but wasn't he also steadying the plane to land it?

A. Didn't need to, his business was to fix that block, [145] so, you know——

Q. To steady the block, but he also had to steady the plane?

(Testimony of Frank Padulo.)

A. He was only, I remember he was right there.

Q. You remember he was by the block?

A. That is right.

Q. I see. You were paying attention to your work?

A. That is right.

Q. You weren't paying too much attention to what was going on above you?

A. Well, I could see him, because the wings was close to him, see. I take the tag line, and I was watching which way the wind was blowing, trying to steady, there was a bunch around.

Q. Other men around, but you were paying attention to your particular job?

A. Well, I was right on the side, you know.

Q. This side, you mean the inshore side?

A. What they call—well, I was behind the plane just a little.

Q. You were behind the plane?

A. In behind steadying one of the tag lines.

Q. You were close to the rail of the ship?

A. No, I was a little off.

Q. You were close to the bulkhead, the house?

A. Toward the barge. [146]

Q. You were toward the barge?

A. Yes, close to the plane.

Q. You were close to the catwalk?

A. Well, in other words—

Q. Look there is a little model, Mr. Padulo. Will you come down here?

A. That is very similar.

Q. Walk down here, Mr. Padulo.

(Testimony of Frank Padulo.)

The Court: Go over there, there's a ship over there.

The Witness: There is a ship over there; all right.

Q. (By Mr. Resner): Of course, Mr. Padulo, this is the catwalk. All right. This, the bulkhead of the midship house, that way is the forward part of the ship? A. Yes.

Q. Over there is to the dock, that is the dockside. A. Yes.

Q. The dockside was to the—this side of the ship, the port side was to the dock, the plane coming from over where you and I are standing.

A. That is right.

Q. Coming over the ship being landed on this section here, and Mr. Luehr was over here on one of these beams out here by the rail.

A. That is right.

Q. All right. How close to the rail, where were you?

A. I was right in here (indicating). [147]

Q. Underneath? A. Underneath.

Q. On the deck? A. That is right.

Q. All right. You would be on the port side—you would be on the port side maybe about two-thirds of the way from the catwalk to the inshore rail?

Mr Cooper: Let him mark the place.

Q. (By Mr. Resner): Mark the place where you were.

A. I couldn't mark—

(Testimony of Frank Padulo.)

Q. Well, approximately.

A. (Witness indicating.)

Q. All right. A. Over here.

Q. I will put a circle there, I will put a "P" in the middle of it. Now, we have got it. Anyway that is where you were holding onto *to* the tag lines?

A. Steadying so the wind wouldn't get hold of it.

Q. Steadying it.

Mr. Resner: All right, Mr. Padulo, that is all.

The Witness: Is that clear enough?

Mr. Resner: Yes, sir.

Mr. Kay: I have just one question.

The Court: All right, go ahead. [148]

Cross-Examination

By Mr. Kay:

Q. Mr. Padulo, at this time that this plane fell down you were busy watching your work and you were looking at a lot of things around there, you didn't keep your eye on Mr. Luehr all the time, is that correct?

A. Well, I was—this is the airplane, and I hold this line under that, watch the airplane, this is right under here.

Q. I understand. You had a number of things to watch at that time, is that right?

A. Well, I was steadying the plane like the rest of them.

Q. Pardon?

The Court: Watching the plane just like the rest of them.

(Testimony of Frank Padulo.)

Q. (By Mr. Kay): Watching the plane?

A. So the wind don't take it away.

Q. So the wind doesn't take it away, and you watched your line, is that correct?

A. That is right.

Q. And waiting for a signal, is that right?

A. Not a signal, just steadying.

Q. Just holding the line? A. That is all.

Q. I see. That is all.

Mr. Cooper: No questions.

Mr. Harrison: Thank you a lot. I believe that is all. Mr. Withers is pretty much in the same boat. From his statement [149] it is merely accumulative.

The Court: Very well.

Mr. Resner: If your Honor please, I would like to ask Mr. Harrison for a stipulation that subject to any later corrections which may be made that the medical expenses which have been incurred on behalf of Mr. Luehr and paid by the Compensation Insurance Carrier, the Firemen's Fund, totals \$7,322.32, and that the Workmen's Compensation that they have paid to Mr. Luehr since the accident happened to date totals \$3,082.20.

Now, if we can get a stipulation to the figures they may be received subject to correction, that will be acceptable. I am not asking Mr. Harrison to stipulate about the legal problem here, because that is something that we will have to present and argue to your Honor at the appropriate time.

Mr. Harrison: I suggest, your Honor, Mr. Resner ask the real parties in interest that they paid

this amount, if they wish to stipulate to the amount.

Mr. Resner: They have furnished it to me and they advised me that they are correct.

Mr. Kay: Yes, I had two tapes run, I gave Mr. Resner one and one to Mr. Harrison, which are taken from the actual individual payments of compensation and the medical expenses, including hospital, X-rays and so on, so that each have exactly the same tabulation. Now—— [150]

The Court: Subject to any correction you wish.

Mr. Harrison: But the Government has no legal interest in the payments that have been made by hospitalization or through compensation.

The Court: All right, state for the purpose of the record the purpose of the offer.

Mr. Resner: All right, Judge, I will tell you in a minute. Under the Longshore and Harbor Workers Compensation Act, Title 33 of the U. S. Code, Section 33, a longshoreman, like Mr. Luehr, who has been injured, has the right either to compensation or to a damage action, but not to both. And if he maintains a damage action as he has here, he is obligated under the law to repay the compensation company what they have advanced for his welfare and benefit. They have paid him more than \$3,000 in compensation and \$7,000 in medical, more than \$10,000 over the past 20 months. Without that money, your Honor, and without that care he would not have been able to have had any medical attention, nor would he have any money to live on, but at the same time, Judge, he has a clear right to maintain this damage action against the United States for their negligence.

Now, any award that he did get the compensation people would be entitled to get back and claim their money. That being the case, that being the case Mr. Luehr has to present that as an item of damage to your Honor to be added to any [151] award that he gets, because that goes back to the compensation carrier through him.

Now, the legal problem is this: Mr. Harrison here contends that the government——

Mr. Harrison: Mr. Resner, I will explain our position.

Mr. Resner: I want to say this to explain my position. I understand your position, if I am wrong about it, you correct me, but I understand that in the contract that the government has with Jones Stevedoring Company there is a provision against subrogation. That means that if Jones or the carrier, Firemen's Fund, pay out some funds for an injured worker, the Government says you can't come back against us, the Government, and collect it.

Now, that may very well be the agreement between the Government and Jones and Firemen's Fund, Judge, but that has nothing to do with the duties that exist between my client, Mr. Luehr and his employer and insurance carrier, because he has agreed to reimburse this \$10,000. It is the only way that he could go ahead with his litigation, because obviously he was in no condition to go ahead and file this suit and have his compensation cut off and his medical attention stopped, and the Firemen's Fund and the Jones people very kindly agreed to continue to pay it while the litigation progressed,

and Mr. Luehr agreed to pay it back. That is a perfectly legal, binding agreement and arrangement.

Now, Mr. Luehr is bound, even though there may be other agreements between the Firemen's Fund and the Government, we are not concerned with that, but since Mr. Luehr has to pay this back, we are entitled to prove it as an element of damage. And I say under Section 33 of the Longshoremen's Act that is so provided, your Honor, and I will be glad to submit the authorities.

The Court: I will hear from Mr. Harrison.

Mr. Harrison: Your Honor, this is not the ordinary case, as pointed out in my opening statement, wherein the employer compensation carrier has maintained his lien or his right to recover back from the libelant in this particular case for this very reason: In the contract of insurance the compensation insurance which was taken out by Jones, they have waived any right to subrogation against the United States. Had Mr. Luehr accepted this money without filing this damage suit against the United States, the Jones Stevedoring Company has waived their right to sue the United States under any subrogation rights which they may feel that they have obtained by payment of this money.

Now, what Mr. Resner has suggested is that Jones be allowed to recover back this money indirectly against the United States by having Mr. Luehr recover it for their benefit. Do I make myself clear?

The Court: Yes. [153]

Mr. Harrison: Now, it is our contention that these items of damages, the hospital bills and the

compensation already paid, are not proper items of damage in any judgment against the United States, because I don't care whether Mr. Luehr has made some separate contract with Jones Stevedoring Company, but if they are included in damages against the United States, then it amounts to nothing but an violation of the anti-subrogation agreement, because those payments will be made for the benefit of the compensation carrier. It is merely allowing Jones Stevedoring Company to, in effect, assign their supposed claim to Mr. Luehr and have Mr. Luehr come in and collect it from the United States in direct violation of their contractual agreement not to subrogate against the United States.

Consequently it is my feeling that any payments that are made by way of hospitalization and by way of compensation are not proper items to be considered in a case against the United States, not proper items of damages.

Now, as far as the amounts are concerned, perhaps we would get them in, certainly going to have to deduct those particular amounts from any judgment against the United States if there be one.

Mr. Resner: How could you deduct damages for hospitalization if you say we are not entitled to it?

Mr. Harrison: Either deduct them or that he is not [154] entitled to them.

The Court: I think the best way, so both sides have a full opportunity to present it—I have never met it before——

Mr. Resner: Well, I haven't this precise prob-

lem, Judge, but I had the subrogation problem before.

Mr. Harrison: I haven't been able to find any cases on it.

The Court: So both sides will have a record I will allow it to go in subject to your motion to strike and over your objection. Is that all right?

Mr. Harrison: Yes, your Honor.

Mr. Resner: All right, Judge. The medical record total then will be the next exhibit for the libellant.

The Clerk: Libellant's Exhibit 16 admitted and filed in evidence.

(Thereupon the medical record total above referred to was received in evidence and marked Libellant's Exhibit No. 16.)

Mr. Resner: Let the record show that that total is \$7,322.32 for medical expenses and hospitalization, doctor bills, and so forth.

And I would like to offer next the compensation payments.

The Clerk: Libellant's Exhibit 17 admitted and filed in evidence.

(Thereupon the compensation payments record above referred to was received in evidence and marked Libellant's Exhibit No. 17.) [155]

Mr. Resner: And that amount, for the record, your Honor, \$3,082.20.

I only want to make this further observation, I will be brief. I am prepared to argue this now if

your Honor wants to hear further about it. It is my conception of the law under Section 33 of the Longshoreman's Act that this anti-subrogation agreement applies only a man receiving compensation has reduced his right to get compensation to an award before the Deputy Commissioner, before Mr. Pillsbury. Under those circumstances, when an award issues in favor of an injured worker, his right to sue the third party is automatically assigned to the insurance carrier and the employer, and they then have the right to sue or not to sue for damages if they think there is negligence of a third party.

It is my conception of the law and of the situation here, your Honor, that the anti-subrogation contract that Mr. Harrison talks about applies only to the situation where an order or an award has been made and where the control of the litigation is in possession of the employer or his carrier. Obviously then, if they have the control of the litigation the Government can say, "Well, you have agreed with us not to sue us," and then that would be true, because they have contracted not to sue, having the right to sue, and they only have the right to sue under an award or order, but in this case there was no award or order. [156]

The injured man, Mr. Luehr, continued to receive his compensation. The compensation carrier could have cut off the compensation at any time, they could have stopped the medical at any time. That would have been an inhuman thing to do. They continued to pay the compensation and furnished

the medical. The consideration that Mr. Luehr then received was this continued compensation and medical and thereby he agreed to pay it back. If they had cut off compensation and medical your Honor, he would have had to go out in the market and buy his medical and medical which he got for seven thousand—it would have cost him fifteen or twenty thousand.

Now, under those circumstances he would have been entitled to collect it from the Government. Are they coming in here now saying that because he has mitigated his damages by this arrangement that that defeats the right to recover it?

I think your Honor will see the justice of the position and the legal merit of it.

Mr. Harrison: I have one sentence to say in that regard. Mr. Resner's interpretation of the law would lead to nothing but collusion between a claimant, a compensation carrier and to the detriment of the third party who may become liable. I will explain that in my final argument.

Mr. Resner: That is an outrageous statement. If an injured worker, who is at death's door is provided with medical attention and compensation, and he has got a clear [157] right to a third party because of negligence, that isn't collusion under any stretch of the imagination.

The Court: Any suggestion of collusion here?

Mr. Harrison: If your Honor please, I believe Mr. Resner and the attorneys for the Jones Stevedoring Company have made an arrangement between themselves entirely outside of the compensa-

tion law whereby Mr. Resner now feels that Mr. Luehr is going to become liable to pay back his compensation regardless of how the court holds, and I think that it was done for the sole purpose of making it possible for Mr. Luehr not to reduce his compensation to an award.

In other words, to maintain and keep alive his possible action against the Government, and it is certainly true that the compensation carrier for the Jones Stevedoring Company cooperated to that respect in that they made voluntary payments and didn't require the man to have a hearing or reduce his claim to an award.

Mr. Resner: I might say——

Mr. Kay: Your Honor please——

Mr. Resner: Let me finish, please. I might say this arrangement happens every day in a case where it is clearly the fault of a third party, as it is the fault of the United States in this case, and not even disputed, Judge. They can't defeat the man's rights in this way. He has got his right to have his compensation and his medical and if he is obligated [158] to pay back he pays it back, he can still proceed with his rights against the third party. The fact that the facts are laid out before the court showing clearly the fault of the United States is hardly justification for the statements made by counsel, they are just trying to avoid their legal liability in the situation.

Mr. Kay: Your Honor, I would like to hear Mr. Harrison's answer to your Honor's question as to whether or not, as he charges here, he is charging

that this might lead to collusion, carrier's collusion in this case. I am very much interested in the matter leading to collusion, his Honor just asked whether or not you are contending that there is collusion in this case.

The Court: I think he used the language there may be.

Mr. Harrison: Speaking of the interpretation of law as Mr. Resner suggested that it could lead——

Mr. Kay: You don't contend there was collusion in this case?

Mr. Harrison: I have expressed the facts which I believe existed, and I draw no opinion from them one way or the other.

Mr. Resner: Mr. Harrison is making sharp charges here.

Mr. Kay: That is a little different thing.

The Court: Well, whether he is right or wrong, he is in good faith, let us say, is he?

Mr. Resner: Well, the charge—— [159]

The Court: Just a moment. Whether he be right or wrong, he is acting in good faith.

Mr. Resner: I will say he is zealous, Judge.

Mr. Harrison: Perhaps I can ask a question. Was there not an agreement between you and Mr. Black or Mr. Kay whereby you agreed to pay back the compensation?

Mr. Kay: Yes, most assuredly. Nobody says there isn't.

Mr. Resner: We have agreed to in turn pay it back to them.

Mr. Harrison: Whether or not the law requires——

Mr. Resner: But the law requires——

Mr. Harrison: Whether or not——

Mr. Resner: We have agreed, since we received, we are obligated to pay them back, that is our obligation under the law.

The Court: The Government says, well, we are not a party to that agreement, that is between yourselves, but we have rights here and he is asserting that.

Mr. Resner: That is what he is trying to say.

Mr. Kay: That is correct, your Honor.

Mr. Harrison: That is right.

The Court: Let us proceed, gentlemen.

Mr. Resner: Mr. Magana will you take the stand and be Mr. Cates?

The Court: It is three o'clock, we will take a recess.

Mr. Resner: All right, Judge.

(Short recess.) [160]

Mr. Resner: We want to read a deposition of the witness Charles Cates, your Honor. This deposition was taken the same day that the previous deposition was taken. The same parties were present. Mr. Charles Cates, your Honor, was the whistle man or signal man who has been identified as being on the catwalk there with Mr. Spirz.

(Mr. Resner and Mr. Magana commenced reading the deposition of Charles Cates.)

Mr. Harrison: If your Honor please, once again there is no showing that Mr. Cates was going to be out of the jurisdiction. There is no showing that he is not available to us. His testimony is best received by his person. So far as I know of my own personal knowledge of it, he is still employed down at Fort Mason, and I checked, I think it was about ten days ago.

Mr. Resner: You agreed to take a deposition. I don't think there is any question but we have a right to use it.

The Court: Your other deposition, the facts and circumstances surrounding it justify it; but if this man is available here he will have to be produced.

Mr. Resner: If your Honor feels so, of course. I only want to offer this suggestion to the Court: I believe that under the Admiralty Law, which applies here, that there is no necessity to produce a witness on the ground that a showing must be made that he is absent from [161] the jurisdiction. I think where a deposition is taken it can be used.

Mr. Harrison: I disagree heartily.

The Court: Legally I don't think your other deposition could be challenged under the circumstances. It might here. Since he is available, produce him.

Mr. Resner: May I ask Mr. Harrison to produce him inasmuch as he is an army employee?

The Court: Yes, if he is available.

Mr. Harrison: Army employees are just as available by subpoena as Smith or Jones.

The Court: Will you assist in locating him?

Mr. Harrison: Yes.

The Court: You will be surprised at the help I get from everyone. All right.

Mr. Harrison: However, I do insist Mr. Resner subpoena him.

Mr. Resner: Let me ask you this: If we don't subpoena him, do you intend to call him?

Mr. Harrison: I do not.

Mr. Resner: All right. And you say he is at Fort Mason?

Mr. Harrison: I checked ten days ago and he was still employed in the employment he had at the time of his deposition. [162]

Mr. Resner: All right. We will call Mr. Luehr.

The Court: It doesn't necessarily follow, under the circumstances, he must be here today.

Mr. Resner: No, Judge. I was just going to check if he was there.

The Court: All right.

Mr. Resner: Mr. Luehr.

FRANK LUEHR

the libelant herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: State your full name to the Court.

A. Frank Luehr.

Direct Examination

By Mr. Resner:

Q. Speak up loudly, Mr. Luehr, and answer all the questions so that everyone in the Courtroom can hear you. Now, you live where, Mr. Luehr?

(Testimony of Frank Luehr.)

A. 2529 Grove Street, Oakland.

Q. When were you born?

A. March 11, 1899.

Q. At what place?

A. Caledonia, Minnesota.

Mr. Resner: I am going to omit many of the preliminary questions, your Honor, because Mr. Magana will ask them in relation to the question of damages and medical, and I am [163] going merely to certain phases of the examination. First I want to take up this question of earnings.

Q. (By Mr. Resner): In the year 1948 you were employed as a longshoreman, were you, Mr. Luehr? A. Yes, sir.

Q. And do you know what your earnings were that year? A. Not exactly.

Q. I have your income tax return here (handing document to the witness). I will show it to you. The total figure is listed right there.

A. That is right. \$3,063.57.

Q. That was all through the Waterfront Employers' Association and through the Mutual Stevedoring Company? A. That is right.

Q. That was in the year 1948, is that right, Mr. Luehr? A. That is right.

Q. Was that the year that there was a strike which lasted 101 days—105 days? A. Yes, sir.

Q. So you didn't work those 105 days?

A. Well, I did a few days, probably a day a week or something like that, they alternated them. for the army and the navy.

(Testimony of Frank Luehr.)

Q. All right. During the year 1948 did you take all the work that was available to you? [164]

A. Oh, yes, sir.

Q. You didn't lay off because of illness or injury or anything of that kind? A. No, sir.

Mr. Resner: Now, if your Honor please, and Mr. Harrison, so that we will have this for the record, Mr. Paul brought in—did he hand you the sheets he brought in today?

Mr. Harrison: Yes, he did.

Mr. Resner: The originals you have there, I take it. All right, I will offer these. I will offer as libelant's next in order the port hours for the port year 1948, your Honor.

The Court: Identify the document for the purpose of the record.

Mr. Resner: It is a compilation prepared by Mr. L. R. Paul, the gentleman who was here yesterday, chief clerk of the Longshoremen's Labor Relations Committee, and it shows the port hours worked during the periods 173 through 210. It indicates the port hours during the period, 1,670, at the wage rates of \$1.67 for the straight time hour and \$2.50 $\frac{1}{2}$ for the overtime hour. May it be received, your Honor?

The Court: Let it be admitted and marked.

(Compilation of port hours for the port year 1948 was [165] admitted into evidence as libelant's Exhibit 18.)

Mr. Resner: And so we have the record before

(Testimony of Frank Luehr.)

us here, your Honor, I have made a compilation, if a man worked the port hours in 1948 he would have worked 1,670 hours. That multiplied by the straight time rate of \$1.67 would give a man for that year \$2,788.90. Mr. Luehr earned \$3,063.57, or approximately \$300 more than the port hours.

If you carry the total out for the 105 days the men were on strike, that would have approximated an additional \$1,000; so if the port year had been normal, that is, without the strike, the average earnings for that year would have amounted to approximately \$4,000.

Now, that of course is a matter of argument, but I wanted the record to show that for the appropriate time when we come to it.

Q. (By Mr. Resner): Now, during the year 1949, Mr. Luehr, do you know what you earned?

A. Well, it seems to me it was around \$4,400. I don't remember.

Q. Well, I have the record here, Mr. Luehr, for 1949 at \$4,252.07.

A. Well, it could be that.

Q. Or could be a little more?

A. I wouldn't say exactly because I don't remember.

Mr. Resner: Well, someone—I don't know how they [166] did it—the United States Attorney got Mr. Luehr's income tax returns. Mr. Harrison, what does the income tax return show for the year 1949?

(Testimony of Frank Luehr.)

Mr. Harrison: I don't have the income tax return.

Mr. Resner: You checked it, didn't you? Didn't you get the information from it?

Mr. Harrison: I have the information. I don't know that it is from the income tax return.

Mr. Resner: How much do you show?

Mr. Harrison: For 1949?

Mr. Resner: Yes.

Mr. Harrison: \$4,252.07.

Mr. Resner: That is what I have got.

Q. (By Mr. Resner): During that year, Mr. Luehr, you worked some time in Alaska, did you?

A. Yes, sir.

Q. In what capacity? A. Longshore.

Q. What month did you work in Alaska?

A. I went up there in June, July, August, September, and probably about half of October.

Q. So you worked in Alaska for four and one-half months? A. About that.

Q. Do you know what you earned in Alaska during that four and one-half months as a longshoreman? [167]

A. No, I can't say offhand.

Q. Approximately?

A. But I would say 25—maybe \$2,500.

Q. All right. In any event, the income tax return for the year shows \$4,252.07?

Mr. Resner: Now, if your Honor please, I want to offer in evidence—Mr. Harrison has called for it—the port hours of San Francisco for the period

(Testimony of Frank Luehr.)

1949, periods 186 to 198; and it was prepared by Mr. L. R. Paul, the gentleman who was here yesterday; showing for this period the port hours were 1,655 hours at a wage rate of \$1.82 straight and \$2.73 overtime. I will offer this compilation as libelant's next exhibit.

The Court: It may be admitted and marked.

(Compilation for 1949 was admitted into evidence as libelant's Exhibit No. 19.)

Mr. Resner: For the record, your Honor, I might say that I have run the totals out of 1,655 hours at \$1.82. If a person had worked the available port hours at this port in San Francisco, he would have received earnings of \$3,012.10. I have given the \$4,252.07 that Mr. Luehr earned, both at this port and in Alaska.

Q. (By Mr. Resner): Now, for the year 1950, Mr. Luehr—that was the year you were hurt?

A. That is right. [168]

Q. Do you know what you earned between January 1st and July 28th, 1950?

A. In the neighborhood of \$1,500, I think.

Q. I show you a copy of your income tax return for that year, Mr. Luehr, and indicate to you, and ask you what that is?

A. That is it.

Q. And that return shows you earned for that period \$1,548.78?

A. That is correct.

Q. Did you work the time that was available to you during 1950 until you were hurt?

A. Yes, sir.

(Testimony of Frank Luehr.)

Mr. Resner: Now, if your Honor please, the exhibit which we have in evidence here, No. 15—libelant's Exhibit 15, the port hours during the year 1950—that is the year that he was hurt—of course he didn't work all that year after he was hurt. The port hours total 1,900 hours. 1,420 of those hours were worked at the rate of \$1.82, then the rate changed on September 30, 1950, and the rate became \$1.92, totalling a ten cent raise per hour. So 480 hours of that period at \$1.92, and 1,420 hours at \$1.82 would amount to \$2,584.40.

480 hours at \$1.92 would amount to \$921.60. Or if a man worked the available port hours in the year 1950 at the [169] two different rates of pay, he would have earned \$3,506.00. Mr. Luehr earned \$1,548.78, as his income tax return shows.

The record further shows, your Honor, that starting with December 26th, 1950, or approximately January 1st, 1950, the year he was hurt, down to July 30th, 1950, two days after he was hurt, 950 hours were available at the port. That would have meant if a man worked all the available port hours in that time he could have earned \$1,729. So the man could have earned, if he worked all the port hours, approximately \$175 more than Mr. Luehr earned in that period.

But in the remainder of the port year—less the half a year—let's see, in four and one-half months there were 950 hours, your Honor, and 450 of those were at \$1.82 and 500 at \$1.92. That totals \$1,779. That means in the period 1950, after Mr. Luehr

(Testimony of Frank Luehr.)

was hurt, a man working the available port hours would have earned \$1,779. The total a man could have earned for that year, as I said, would have been \$3,506.

I might say, your Honor, I have run out the computations on Exhibit 15, and they show that for the year 1951, last year, your Honor——

Mr. Harrison: Well, if the Court please, this has run on long enough. It is all argumentative and should be reserved until the end of the trial. We are here to hear what Mr. Luehr has to say. I think all this is argumentative. [170]

Mr. Resner: It isn't anything of the kind. I am showing just the totals. I am doing that to get it in orderly fashion, and the earnings in this period of 1951, if I may go over it, will complete the record.

The Court: Are you about to conclude?

Mr. Resner: Yes, I am.

The Court: Proceed.

Mr. Resner: In 1951 the port hours total 2,360; 1,120 hours were worked at the rate of \$1.92, \$2,-150.40; and 1,240 hours at \$-1.97—the rate changed \$2,442.80; so that if a man worked all the available port hours in 1951 he would have earned \$4,593.20.

That takes us up for the years 1948, 1949, 1950, 1951.

Q. (By Mr. Resner): Now, Mr. Luehr, I direct your attention to July 28th, 1950, and ask you if you were involved in an accident on that day?

A. Yes, sir.

(Testimony of Frank Luehr.)

Q. What time of day did the accident happen?

A. I think it was around 11:30 in the morning.

Q. In the morning? Where were you working at the time of the accident?

A. I think they call it the Alameda Army Air Base.

Q. Were you on a ship at the time of the accident? A. Yes, sir. [171]

Q. What was the name of the ship?

A. Shawnee Trail.

Q. Who was your employer at the time?

A. Jones Stevedore Company.

Q. Were you working as a longshoreman?

A. Yes, sir.

Q. What kind of cargo was being loaded at the time you were hurt?

A. We were loading jet airplanes.

Q. Loading jet airplanes? At what particular part of the vessel were you located when the accident happened?

A. It was on the after end of the ship.

Q. On the after end of the ship?

A. On the port side, on the inshore side.

Q. That is on the aft forward of the house?

A. That is right.

Q. On the inshore side? A. Yes, sir.

Q. Do you know what you had done between the hours that you had turned to in the morning? By the way, when was that?

A. We went to work about eight o'clock in the morning.

(Testimony of Frank Luehr.)

Q. The accident happened at 11:30?

A. Yes.

Q. Those several hours do you recall what kind of work you [172] did?

A. Well, I think we loaded planes at the forward end of the ship.

Q. Forward or after?

A. At the forward end of the ship, then we moved aft to load.

Q. I see. To load this particular plane?

A. To load this particular plane.

Q. Now, Mr. Luehr, I want you to tell the judge just what you were doing and what you saw and what happened with regard to how this accident happened?

A. Well, the best I remember is that while this plane was being hoisted off the barge and it probably was around forty feet in the air—that is, off the deck, and it has to be that high to clear all the stays and other obstructions on the ship so it won't be damaged in any way.

As the plane was being taken over to the port side of the ship, it was lowered and maybe it stopped once or twice so that the plane, the wings, the fuselage not being damaged in any way. I was on the main deck, and after the plane was coming down I got up on the mechano deck. There is no way of getting up there but climbing up. There is no stairway. I was standing way out on the outer edge as the plane was coming down, and it stopped, I think, within about six feet of the mechano deck.

(Testimony of Frank Luehr.)

What I mean, six feet of the bottom of [173] the fuselage on the mechano deck.

Q. There were these struts on either side under the wings?

A. There is one on each side underneath the wing.

Q. All right.

A. I remember the whistle man giving the signal to stop the plane, and it did stop; and as it did I moved forward a few steps, maybe four or five, to get in the position that I was, so I could help steady the plane. There is no way of getting hold of the plane outside of probably the strut with one hand and the fuselage with the other.

Q. You are indicating your left hand?

A. I had hold of the strut with my left hand. The plane was, we will say, about so high (indicating)—that is, the strut—and the fuselage was probably about this far from my head (indicating).

Q. You are indicating about six or eight inches above your shoulder?

A. That is correct. And I remember having my right hand on the fuselage. Just where, I couldn't say.

Q. What were you standing on, Mr. Luehr?

A. Well, I was standing on this mechano deck. I don't know just exactly how wide they are. Seems to me they are about six or eight inches wide.

Q. Were you standing on one of these solid beams? A. Yes. [174]

Q. One of the solid beams?

(Testimony of Frank Luehr.)

A. Yes. I had my left foot forward.

Q. Toward the catwalk?

A. Toward the catwalk. There was a cross beam that run fore and aft between my right leg and my left leg.

Q. One of those moveable beams?

A. That is correct. You had to stand in that kind of position on the mechano deck to brace yourself. In holding that plane with your left hand on a strut and your right hand on the fuselage, evidently you will have to be pretty close to the plane or—probably the wing would probably be just about over your shoulder, or the fuselage. I don't remember just exactly.

But all of a sudden something gave way as though a line was cut. It dropped and it hit me on my left shoulder and threw me forward with a great crash. I landed head first down toward the deck.

Q. Do you know whether you fell altogether, or do you recall striking the beams and the plane falling on you and coming up and then falling again, Mr. Luehr?

A. No, I don't remember. I remember when it fell and I fell toward the deck head first, then it either bounced or the operator lifted it. That I don't know. But it gave way and I landed on the deck in a position of this kind, with my hands first, head down first. [175]

Q. You have indicated the plane fell on you pinning you to the mechano structure?

A. That is right.

(Testimony of Frank Luehr.)

Q. Moved up again a bit, and you fell off the mechano deck onto the solid deck beneath?

A. That is correct, yes.

Q. How long had the plane been standing there in the stationary position with your hand onto it before it fell?

A. It could not have been very long. Just approximately a few seconds, I would say.

Mr. Resner: All right. I am going to let Mr. Magana take the rest of the examination.

Direct Examination

(Continued)

By Mr. Magana:

Q. Mr. Luehr, I want to, just for a moment, go back a ways from the scene of the accident, and to ask you first of all, would you tell the Court just in a brief way about the type of work you did before you went stevedoring?

A. Well, coming from Minnesota, or being in Minnesota, I was on my father's farm there up until about 1926. I came to Los Angeles and done various work for maybe six months. I came up into the Sacramento Valley, and I worked up at Willows and around Willows doing tractor driving, warehouse work and harvest work.

In 1940, I believe it was, I was in the fire department [176] for about fifteen months. Then I came to work in the Bay Area for Moore Dry Dock Company in Oakland, until 1943 I went to work as a longshoreman, and have been up till date.

(Testimony of Frank Luehr.)

Q. Then prior to the time that you went to work as a longshoreman in 1943, your work had been manual labor completely, is that right?

A. All hard work.

Q. All right. Prior to the time that you suffered this accident, July 28th, 1950, had you previously injured any part of your body?

A. No, sir.

Q. Then after you suffered this accident do you remember being withdrawn from the ship to a hospital? A. Yes, I do.

Q. To what hospital were you taken?

A. Alameda Hospital.

Q. En route there did you have any pain about any portion of your body? A. Excuse me?

Q. En route, or going over to this Alameda Hospital, were you suffering any pain, or do you remember? A. Oh, yes, I had great pains.

Q. Whereabouts?

A. In my back, mostly, at that time.

Q. While you were there on the mechano deck did you notice [177] any portion of your body, whether it was different than before?

A. Well, as I—after I fell on the deck, just a few seconds, yes, I knew there was something wrong with my leg.

Q. Which leg?

A. My left leg. And I looked down and I saw my bones sticking through my pants leg.

Q. Whereabouts? Can you show the Court?

(Testimony of Frank Luehr.)

A. Approximately here (witness rolled up pants leg and indicated).

Q. You are indicating just below the knee, is that right? A. Just below.

Q. All right. You have been in the hospital on several occasions since this accident, is that so?

A. That is correct.

Q. Now, without telling the Court as yet what they did for you in the hospital, will you give the Court an outline of the times you have been in the hospital since this accident? I believe there were five times altogether.

A. Well, I was taken to the hospital after the accident and I was there 100 days.

Q. That would take you about to November 5th of 1950?

A. That's right. I got out November 5, 1950. I went back in again in the first part of December, maybe the 5th [178] or 6th, and I had another operation on my leg, and I was released about ten days later.

Q. That would be about the 16th of December?

A. The 16th, I think it was, when I got out. Then on about February some time, I don't remember the exact date, I went to the Merritt Hospital in Oakland and had a cast, a new cast put on.

Q. The left leg? A. On my left leg.

Q. All right.

A. And I was there only, well, the one day and out the next. Then on March 11th of last year I went to the hospital again, the Merritt Hospital, and

(Testimony of Frank Luehr.)

on the 12th the doctor operated on me on this side and undermined all this skin (indicating).

Q. Yes, we will come to that in just a moment, but how long were you in the hospital this fourth time? You went in March 11th. When did you get out?

A. Well, that was, I think, about 45 days.

Q. That is about April 17th, is that right?

A. Approximately, yes.

Q. When were you in for the final time, in the hospital? I think the record will show in August 16th?

A. I think it was in August.

Q. How long were you there that time? [179]

A. About ten or twelve days.

Q. Since that time have you not been in the hospital?

A. No, sir.

Q. The first time, then, when you were in the Alameda Hospital, when you were there approximately 100 days, will you tell the Court approximately when it was that you were aware of any pain or suffering about any portion of your body?

A. Well, the first few days, I might say a week, there wasn't much pain of any kind because they had me so doped up that I didn't know what I was doing, if I was coming or going. But as time went on I had a great big lump, almost the size of my fist, in the middle of my back; and that gave me great pain because I couldn't lie on my back, I couldn't lie on my side.

Q. Excuse me. Could you indicate—can you stand up without too much difficulty?

(Testimony of Frank Luehr.)

A. Yes (standing).

Q. Will you indicate to the Court where this lump was that you saw was in the middle of your back? Would you mind turning so that counsel can see?

The Court: I can see.

A. Right in there (indicating on back).

Q. (By Mr. Magana): You are indicating the middle of the back above the belt line, is that [180] right?

A. About two or three inches above the belt.

Q. All right, will you sit down? Continue and tell us about that 100 day period, just generally?

A. I have also a lot of pain lower, around by hips, coming toward the front, which gives me a great deal of trouble.

Q. Excuse me, Mr. Luehr. Did you notice that while you were in the hospital in that first 100 day period? A. No, I didn't.

Q. Well, that is what I want you to tell the Court about. During that 100 day period you have told us at some time you observed that lump in the back about the size of your fist.

A. That is correct.

Q. Did you observe anything else or notice anything else? A. No.

Q. Did you have any pain while you were in the hospital there?

A. Not a great deal. I was lying still most of the time.

Q. Then when you got out of the hospital after

(Testimony of Frank Luehr.)

the 100 days were up, how did you leave the hospital? A. Some friends brought me home.

Q. In a car? A. That is correct.

Q. Were you wearing a cast any place?

A. Oh, yes, I was in a cast.

Q. Where? [181]

A. My left leg, way up to my groin.

Q. Then when you got home, the next entry into the hospital was December 6th. What did you do from November 5th to December 6th of 1950?

A. Well, I was in bed the greater part of the time. I tried to sit up several times. I probably couldn't sit up more than two or three hours at a time in the day time.

Q. Well, in that time were you suffering pain about any portion of your body?

A. Yes, my back. My back gave me quite a bit of pain.

Q. Whereabouts?

A. This lower vertebrae here just above my belt-line.

Q. All right. After you went in then and went back to the Alameda Hospital December 6th and remained there for ten days, what did they do for you there at that time?

A. Well, they operated on my leg. He cut out a lot of dead bone and infection.

Q. Whereabouts was that?

A. This is the incision right there (indicating), and he cut in here, around through here.

(Testimony of Frank Luehr.)

Q. You are indicating below the knee on the front side?

A. Below the knee, that's right.

Q. Were you put in a cast again?

A. Oh, yes.

Q. And then how did you get home on December 16th? [182]

A. With some friends.

Q. Then from December 16th till you went back to the hospital on December 1st of 1951, were you wearing a cast?

A. That was just for a cast change.

Q. During that period of time, though, Mr. Luehr, were you wearing a cast?

A. Oh, yes.

Q. And was there any drainage from the wound there about your leg?

A. Oh, yes, it has been draining ever since.

Q. Were you suffering any pain during that period of time?

A. Not a great deal, because I couldn't bend my leg. My leg was perfectly straight.

Q. How about your back? How is that feeling?

A. My back pains me all the time.

Q. Stop for a moment at February 1st and tell us, you said the plane hit you on your left shoulder. As of February 1st, of 1950, were you having any pain or any discomfort about the left shoulder?

A. You mean before the accident?

Q. No, February—I am sorry, February 1st of 1951, were you suffering any pain about the left shoulder?

A. Oh, no.

(Testimony of Frank Luehr.)

Q. Then coming into March 11th of 1951, your fourth entry [183] into the hospital when you remained for 45 days, just generally what did they do for you there at that time?

A. Well, I can probably show you better. He made an incision on this side (displaying leg). He undermined that skin on this side and then about a week later he made this incision and undermined all the skin on this side.

Q. Yes.

A. Then about a week, or I don't know how many days it was—maybe ten days—he cut a deep hole in here and took out dead bone and a lot of infection that was in the leg at that time. And he took—my doctor, that is—

Q. That is Dr. Walker?

A. Dr. Walker. Took skin off this leg and grafted skin on this side and on this side to push this together, because there was such a large opening here that it could never heal.

Q. All right. He took skin from your right thigh to put on the inside of the left calf, is that right?

A. That is right. [184]

Q. Would you for a moment—may I ask for the privilege of showing it to the Court?

The Court: We have the doctor here?

Mr. Magana: Yes, we will, thank you, that is right.

Q. Thereafter when you got out of the hospital on April 17 did you have a cast on at all?

A. No, sir.

(Testimony of Frank Luehr.)

Q. How did you get out of the hospital? By that I mean did you walk out or were you ridden out?

A. No, they took me out in a wheelchair then up to the door, and then I walked on crutches from the chair to the car.

Q. Well, then, you got home some time around April 17th. What did you do from April 17 until August 16?

A. Well, I couldn't do much walking, because my—there was that bone had been undermined, the infection had been taken out, and it wasn't too strong.

Q. Well, was it still draining? A. Oh, yes.

Q. Were you able to bathe at home?

A. No, sir.

The Court: It is draining now?

The Witness: Pardon?

The Court: It is draining at the present time?

The Witness: Yes.

Mr. Magana: Now, on this draining matter, when did you [185] first notice that it began to drain?

A. I couldn't answer that, because I don't know. It has been quite some time ago.

Q. All right. Then finally this last admission from August 16 to August 28, what did they do for you then?

A. Then they operated on me again and took out my infection and more dead bone.

Q. And when you left the hospital that last time how did you leave it, walking or wheelchair or how?

A. Well, no, I think I was on crutches at that

(Testimony of Frank Luehr.)

time. They may have taken me out on the wheelchair so far as the door.

Q. At any rate, when August 28 of 1951 came around were you wearing a cast any place?

A. No, sir.

Q. Now, to this time, from the date that you were in the hospital the first time, until you were released from the Merritt Hospital on August 28 of 1951, do you still have the complaints about your low back?

A. Oh, yes, my back is awfully sore.

Q. Were you getting any treatment for it during that period of time?

A. I have had some physical therapy treatment.

Q. And what type, would you indicate, please?

A. You mean where? [186]

Q. No, what did they do for you?

A. Oh, they put an electric heat on there and then they rub it with oil, and that is about all there is to that.

Q. All right. From August the 28th of 1951 to this present time, March, the middle of March of 1952, have you been seeing the doctor?

A. Oh, yes.

Q. What treatment have you been getting?

A. I was treating my leg all the time.

Q. You're indicating the left leg?

A. My left leg, yes.

Q. Now, have you been getting any treatment for the back?

A. Well, my—as I say, the physical therapy has

(Testimony of Frank Luehr.)

been giving me treatments, but not the doctor hasn't.

Q. How often are you getting the treatments?

A. Well, every time I go to the doctor I have been going to the physical therapy, and then up until some time ago he left, didn't bother about by back, but she worked on my knee and ankle so I could get my leg under me.

Q. Which knee and which ankle?

A. On my left leg, my left knee.

Q. All right. Now, at the present time then and between August 28 of 1951 and the present time, have you been using crutches to get around?

A. Oh, yes. [187]

Q. And I notice that you don't have a crutch here in court today, but how long have you been using the cane instead of a crutch?

A. I worked—walked with the cane and a crutch for quite some time. I finally got rid of the crutch and walked with my cane alone.

Q. Since what time?

A. Oh, we will say three months, probably.

Q. And with reference to walking about how much walking are you doing, say, as of March 1?

A. Oh, I don't walk a great deal, maybe three blocks, four blocks at the most.

Q. Have you been doing that daily?

A. Oh, no, maybe once a week.

Q. All right. Well now, then, at the present time to bring us down to this date, can you tell us, do you have any present physical complaints at this time?
A. Yes, my back is very, very sore.

(Testimony of Frank Luehr.)

Q. Well, if you will, so that we don't miss anything, will you start from the top and go down; do you have any complaints about the head at this time? A. No.

Q. Do you have any complaints about the left shoulder or this left collarbone?

A. No, sir. [188]

Q. How about your rib cage?

A. My ribs are all right.

Q. Have you any complaints about the ribs at this time? A. Not a bit.

Q. How about your breathing?

A. Well, I am short of breath if I walk any distance at all. I just noticed a while ago when I was out there, when I came back again I breathed awful heavy.

Q. Before the accident had you ever had any trouble with breathing in doing your stevedoring work? A. Oh, no.

Q. Continuing on down, how about your back, how is it at this time?

A. My back is still very, very sore.

Q. Whereabouts?

A. Whereabouts, did you say?

Q. Yes.

A. Well, about two or three inches above my belt line, I would say, and then it goes down to around my hips, around the sides; my hips are very sore. I have a great pain here on my left side, on my left hip. It also pains me underneath here to my knee (indicating).

(Testimony of Frank Luehr.)

Q. Indicating underneath the thigh and down into the knee. A. In my left leg.

The Court: Left leg. [189]

Q. (By Mr. Magana): Yes, it was on the left side. A. On my left side, that is right.

Q. Now, with reference to this pain about the back, I am referring to the one that is two inches above the belt line in the middle of the back, has that pain gotten any better or any worse than it was before?

A. No, it isn't any better. About, I don't know, ten days ago, twelve days ago, why I had quite a relapse one night after I went to bed. I had terrific pain and I couldn't, I tried to get up in a sitting position. I couldn't do that. I couldn't lie down, I asked my wife to give me a couple of Anacin tablets, which she did, and about an hour later I took a few more. They didn't seem to help me any, and I did not get no rest all that night.

Q. Since that time have you noticed any difference about the pain in your back?

A. Yes, my—it seems as though quite a bit of that pain has gone to my hip and——

Q. Which hip?

A. My left, my left hip.

Q. Well, now, in describing this pain, can you tell us what type it is? Is it a dull, a sharp one, an aching one, or what type?

A. Well, in my hip it has been a very sharp pain.

Q. No, I am referring now to the pain in the

(Testimony of Frank Luehr.)

back two inches [190] above the level of the belt.

A. That is always a very sharp pain.

Q. Does it go away at all? A. No.

Q. Then is it with you all of the time?

A. All the time.

Q. Have you noticed any improvement in that pain? A. No, sir.

Q. Well, other than the pain there do you notice any pain into any other portion of your body traveling, that appears to travel from the back and small of the back that you describe?

A. Well, as I said before, I have this pain around my side, in my hips.

Q. You're indicating with your hand around the side?

A. And what I mean, towards the front of me here.

Q. And about—pardon me.

A. Excuse me, but I cannot sit on anything hard; that is why I sit on this pillow.

Q. Now, with reference to that pain that you say goes down into the hip and into the back of the leg, let us take the one into the back of the leg first, the left leg to the knee, when did you first notice that, if you remember?

A. Well, since the last 10 or 12 days when I had the relapse, that is really hit my hip more than what it did before. [191]

Q. Now, how about the feeling in your leg below the level of the knee, how is that?

A. You mean down below here? (Indicating.)

(Testimony of Frank Luehr.)

Q. Yes. A. Below my knee.

Q. Yes.

A. Well on this side here it is a numb feeling.

Q. You are indicating——

A. It is a numb feeling.

Q. You are indicating the outside of the leg below the knee? A. That is right.

Q. How far down does it go?

A. I would say all the way from the knee to my ankle.

Q. For how long have you noticed that?

A. It always has been that way, that is, since the accident.

Q. How about the left ankle? How is that?

A. My left ankle is also very weak and very sore. I have not got the right movement in it, it hurts me when I walk.

Q. How about the right ankle?

A. That is also weak and it bothers me a great deal if I walk, we will say, three or four blocks, why, my right ankle is just as tired and sore as my left ankle.

Q. Now, you indicated something about the knee of the left leg, can you move your left leg in a backward motion such as I am indicating, as you can the right one? [192]

A. I think it is up to about 90 degrees, a trifle past 90 degrees.

Q. Have you noticed any improvement in that?

A. Yes, I think it has been getting a little better.

Q. And for how long has it been since you have

(Testimony of Frank Luehr.)

been able to move it to the position that you just indicated?

A. Oh, that's been getting better gradually for, I would say, maybe—at one time my leg was really stiff, I couldn't bend it at all, so with the physical therapy and the help of myself trying to bend it, why, it has been going on now maybe five or six months, I would say it has been getting better all the time.

Q. Now, I notice in sitting here that you appear to push on your left hand and to rest on your right elbow. Is there any reason why you do that?

A. I always sit that way, it takes the pressure off my back.

Q. Off of what portion of your back?

A. Well, say from here up, if I can keep my elbows—(indicating).

Q. You are indicating above the belt line on both sides up?

A. Up if I get the pressure off that injured place it doesn't hurt near as much as it does otherwise.

Q. Now, about walking. Previously you indicated that about once a week you might walk two or three blocks or so. Do you notice any difficulty in walking? [193]

A. Oh, yes, it is very hard for me to walk.

Q. Whereabouts, if any place, does it hurt you?

A. My ankle and my knee and my hip.

Q. Have you noticed whether the hip has been getting any better?

(Testimony of Frank Luehr.)

A. No, it isn't getting any better.

Q. Well, are you feeling any more pain there?

A. You say more pain?

Q. Yes.

A. Well, as I said, when I had the relapse it—I had quite a bit more pain in it.

Q. In walking can you tell us, can you walk without the use of a cane?

A. Just a short distance.

Q. And when you do use a cane in what way does the cane appear to help you?

A. Well, it seems to take a lot of weight off my body because I put a lot of weight on the cane and doing so, why, it relieves the pain in my back a great deal.

Q. How about with reference to sleeping as you are at the present time; do you find that you sleep as you did before the accident?

A. No, I don't get any rest.

Q. Well, can you give the Court any idea in any given period how much do you sleep? [194]

A. I probably get not over four hours of rest any night, and since this relapse, why, I don't think I get over two or three at the most.

I have gotten some sleeping pills from my doctor to get me a little bit more rest, and that has helped me some.

Q. Well, is there any position that is more comfortable than any other position in bed?

A. I can't lay on my left side, because it, the pain's too severe in my hip, and I cannot lay on

(Testimony of Frank Luehr.)

my back very long, probably just a minute or two, and about the only position that I have laying in bed is my right side, and you get tired laying on the right side all the time.

Q. Well, at the present time as you are now, well, let us say as you have been for the past month, have you tried to carry anything at all?

A. No, I don't carry anything. I—about the only thing I ever carry, as I remember, is that I carried a little portable radio, I don't think it weighs over eight or ten pounds, into the bedroom one night, like to listen to the radio in bed, and when I did come in there my wife says, "What is the matter with you?" She says, "You sound as though you done a day's work." I had awful short breath, as though I had done a day's work.

Q. In going up and down steps, Mr. Luehr, do you find that you can do that as well as you can walk on a level surface? [195]

A. No, I just take one step at a time. I can't go one step over the other.

Mr. Magana: I think that is all.

The Court: We will take an adjournment until tomorrow morning at 10 o'clock.

(Thereupon an adjournment was taken until Wednesday, March 19, 1952, at the hour of 10 o'clock a.m.) [196]

March 19th, 1952, 10:00 A.M.

The Clerk: Luehr vs. United States.

Mr. Resner: Ready.

Mr. Harrison: Ready.

Mr. Kay: Ready.

Mr. Resner: Your Honor, please, so that there will be no mistake about the matter which we discussed yesterday, I wonder if I may direct to the Court's attention Exhibit 16. That is the exhibit which shows that the sum of \$7,322.32 has been expended on medical; and I want the record to show the agreement between Mr. Luehr and myself as his attorney to repay that money to the compensation carrier, it having been received by Mr. Luehr as a loan.

And the record will further show as we proceed here that the moneys were paid to the doctors in the hospital at what are called industrial rates. We will show, your Honor, as we proceed, that those rates were perhaps half or less than half of the usual rates.

The Court: What relation has the contract between you and your client to do with the issues here in relation to the Government.

Mr. Resner: That this can be recovered. It will be the same as though Mr. Luehr had gone to any third party and borrowed money to pay his medical expenses, which he of course [197] didn't have, and be entitled to recover it back as an item of special damages.

Mr. Harrison: The Government's position is that

unless the law allows him to recover such contract between the parties is entirely outside the issues of this case.

Mr. Resner: We will be prepared to show your Honor under the Longshoremen's Act and under the cases that this is a proper item of damage.

The Court: All right.

Mr. Resner: We also want to direct your Honor's attention to the fact that we tried to get our doctor here, but he had an emergency operation this morning and he will be here at two o'clock this afternoon. We are going to proceed with Mr. Luehr, and when we finish with him that will be our case, except for the doctor, and it may be that we shall not consume the entire morning, but under the circumstances we will have to ask your Honor's indulgence in that.

Mr. Harrison: This is a new development to me in the last five minutes, and I just notified my witnesses we wouldn't get to them today, because I understood the doctor would be here and I assumed he would take the remainder of the afternoon. I am trying to contact a witness to come in this morning, but if I am unsuccessful——

The Court: That is all right. All you need here is good faith in whatever you care to do. [198]

Mr. Resner: Thank you, Judge.

FRANK LUEHR

the libelant herein, resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Frank Luehr to the stand, heretofore sworn.

Mr. Magana: May I ask the Court's permission to ask one more question?

The Court: Very well.

Direct Examination

By Mr. Magana:

Q. Mr. Luehr, in walking up to the witness stand now I think we observed you took your time and walked slowly. Will you, just as a final question, or answer to a final question, tell us why it is you walk so slowly?

A. Well, I would have terrific pain in my back and my hip. I don't know if my leg will break again or not. I am very careful with it. I have had so many operations, I don't feel I want to break it again.

Mr. Magana: All right, that is all.

Mr. Harrison: I assume my cross-examination is first in order, your Honor, although I don't think I should have to do it on all of these witnesses. There are other respondents in this matter. But since I did it on the first, I will be glad to do it this time. [199]

(Testimony of Frank Luehr.)

Cross-Examination

By Mr. Harrison:

Q. Mr. Luehr, did you advance any money out of your own pocket for medical expenses?

A. No, sir.

Q. How long were you working as a stevedore, Mr. Luehr? A. In 1943.

Q. Started work as a stevedore in 1943?

A. Worked in the Fire Department at Willows, about 150 miles north of here.

Q. Then you came up to San Francisco to take a job as a stevedore?

A. Before I went stevedoring, I am sorry, I did work in the shipyards for a couple of years before I came.

Q. What did you do in the shipyards?

A. I was an expediter.

Q. What does an expediter do?

A. Well, I was expediter for the shipwright's department. You have to get all kinds of material, whatever they want they come and tell me what they want and I get it for them.

Q. By getting it for them, what do you mean? Go to the tool shop or machine shop and get the stuff?

A. That is right. I go to the machine shop, to the warehouse, or whatever it might be, for various things—lumber, [200] steel.

Q. Do you have to carry those things personally,

(Testimony of Frank Luehr.)

or do you just go and make sure they were ordered and proper men carry them?

A. I order it and then had a truck ordered to bring it up to wherever it should be.

Q. Was that heavy work at all, Mr. Luehr, or was that primarily—

A. (Interposing): No, that wasn't really heavy work.

Q. Have you ever had any other accidents at all, Mr. Luehr? A. No, sir.

Q. No other accidents at all?

A. No accidents.

Q. Have you ever received compensation before?

A. One time at Willows, as I recall, a truck handle—hand truck hit me in the side and I fractured a rib, and the doctor taped me up, and I was on compensation at that time for I don't know how long, maybe a couple of weeks.

Q. That seems to be an accident, Mr. Luehr.

A. I think it probably would be called that.

Q. Did you ever get hit by a falling sack when you were working aboard the SS Hawaiian Planter?

A. Falling what?

Q. Falling sack. I am sorry I don't have any further information on it. From the compensation records, it apparently [201] happened when you were forty-eight years of age. That was in 1947. The injury was a sprained thumb?

A. Oh, I remember that now. I had forgotten about it. I was working on my car and something slipped, I don't know what, but anyway I caught

(Testimony of Frank Luehr.)

my thumb between the axle and the screen and I did receive compensation at that time. I had forgotten about it.

Q. Well, it appears that the records show you were hit by a falling sack. Sprained left thumb.

A. Falling what?

Q. Sack—s-a-c-k—I guess flour, sugar, potatoes. How do you explain that annotation?

A. I don't remember that. Where was it at?

Q. Your address at that time was 2523 Grove Street. I will show you this to refresh your memory (handing document to the witness.)

A. Would that be for the Matson Shipping Company?

Q. I think the Hawaiian Planter is a Matson ship. Most of those Planter ships are.

A. There was no compensation connected with this.

Q. Nevertheless, you reported an injury, did you not?

A. Oh, I think that—you said a sack of flour?

Q. It says "A sack." I just gave you a sack of flour as an example.

A. I remember that, but there was no broken bones or anything. [202] A sack of sugar——

Q. Sack of sugar?

A. ——slid off, I don't know how many feet, probably ten or fifteen feet, and it knocked me over and by doing so I braced myself on the floor and I sprained my thumb, and they sent me to a doctor

(Testimony of Frank Luehr.)

and had x-rays taken, but there were no broken bones. I didn't have no treatment of any kind.

Q. Now, the compensation records indicate that a week later—that is, on the 17th—this accident happened, apparently on the 9th, 9/9/47. On 9/17/47 there was another accident reported: "While placing box partner pushed from the other side, smashed tip of third finger, right hand."

Do you recall that accident?

A. No, I don't.

Q. Your address was the same at that time, and the employment was longshoreman. It was also aboard the S. S. Hawaiian Planter, from the indications on the compensation records.

A. You said I have a sore finger?

Q. It indicates that you smashed the tip of the third finger, right hand?

A. I honestly and truly don't remember that particular accident.

Q. I see. Thank you. Now, can you recall whether or not there was an accident on May 5th, 1949, at 2:30 p.m., which [203] the compensation records indicate occurred in this manner:

"While dispatching a sack of coffee from Hatch No. 2 the man was lifting the sack of coffee when he sprained his back."

Do you remember that report?

A. No, I do not. I sprained my back?

Q. That is what the report indicates, Mr. Luehr. Also indicates that there was no loss of time.

(Testimony of Frank Luehr.)

A. No, I really don't remember.

Q. You don't recall that accident at all?

A. That was in 1949?

Q. Yes, May 5th, 1949.

A. Was a report made of that?

Q. Yes, it was. Apparently the report was made to your foreman immediately, and you were working for the Marine Terminals Corporation?

A. No, I really don't recall that.

Q. All right, thank you.

Mr. Harrison: If your Honor please, we will reserve putting these records into evidence until Mr. Patterson from the Compensation Commission is here to properly identify them.

Mr. Kay: We have no particular objection.

Mr. Harrison: I would like to have Mr. Patterson here anyway. [204]

Q. (By Mr. Harrison): Mr. Luehr, before you went to work aboard the Shawnee Trail the day before the accident—I understand you had worked the day before and reported to work again the day of the accident? A. That is right.

Q. Before you went to work the day before, that is, the day before the accident, had you ever worked on a skeleton deck like this before?

A. Never.

Q. Did you feel that this mechano deck or skeleton deck provided you a safe footing, Mr. Luehr?

Mr. Resner: I object to that, your Honor, as calling for the opinion and conclusion of the witness on a matter in which he isn't qualified to ex-

(Testimony of Frank Luehr.)

press an opinion. A longshoreman works where and as directed. If a man decided all of a sudden that particular job he didn't want to work, there would be real chaos. My experience shows these men work when, as and how they are told, and they are not to express opinions about matters of that kind.

Mr. Harrison: If your Honor please, I think the man is the most qualified of anyone of us here to tell us whether or not he thought it was a safe place to work. If he didn't think so—if he didn't think it was so unsafe so as to justify him not working, that is a qualification.

The Court: Let me suggest that what he might think [205] about it couldn't enter into the merits of this case for this reason: It might be a perfect job and perfectly safe and he might think otherwise, to the contrary.

Mr. Harrison: That is very true, your Honor, and I think his beliefs are very pertinent.

The Court: What he may think about it, how is that going to assist us here?

Mr. Harrison: Well, what I was driving at, your Honor, if he had some feeling it was unsafe, I was then going to ask him if he took any special precautions.

The Court: Well, maybe I am blind, but when a fellow works on a job and his job is at stake and it is his livelihood—probably I am unduly sensitive about it, for I know the conditions, I think, better than the average judge at least, for I have had that interest in the human struggle all my life. However,

(Testimony of Frank Luehr.)

I don't want to do violence to the law, but the ultimate facts are the matter I have to make a determination on, not what he thinks.

Mr. Harrison: That is true, your Honor, but it may very well be true, too, that a man thinks it is unsafe, and felt the necessity of his job obliged him to work in an unsafe place.

The Court: Read the question so that we won't get confused.

Mr. Harrison: I merely asked if he felt he had a safe [206] footing at the time of the accident.

The Court: Let the Reporter read it.

Mr. Harrison: Excuse me.

(Thereupon the Reporter read the question as follows: "Did you feel that this mechano deck or skeleton deck provided you a safe footing, Mr. Luehr?")

Mr. Kay: Pardon me. At this point I would like to interpose my objection on the grounds that it is incompetent, irrelevant and immaterial, and that no proper foundation has been laid.

The Court: I will sustain the objection.

Q. (By Mr. Harrison): Mr. Luehr, at the time of the accident, did you consider yourself a particularly agile person?

Mr. Resner: Well, if your Honor please, I am going to object to that as being irrelevant, too. Any question in this case must be related to the matter of proximate cause. The proximate cause of this accident was the falling of this plane through the

(Testimony of Frank Luehr.)

negligent act of another person. What Mr. Luehr thinks, if he were an acrobat or whatever else he may have been, would not have changed the ultimate result where he had no control over the situation. These questions of Mr. Harrison's apparently are designed to excuse the Government of a culpable act, and they have no relationship to proximate cause. [207]

Mr. Harrison: Mr. Resner's objection is nothing but an argument on the ultimate issue in the case. I don't think the objection is proper.

Mr. Resner: Then I will object, if you want me to state it in legal words, I will merely object to his Honor upon the ground that this calls for the opinion and conclusion of the witness on an immaterial matter.

Mr. Cooper: If the Court please, I would like to be heard on that question. The question is proper and material for the reason that contributory negligence has been pleaded in this case, and the man's state of mind, whether it be a fact or not, is pertinent. And I might add further that on the question of being on the job, the longshore walking boss testified yesterday, as your Honor will recall, a man is free to leave the job at any time he wants, and they do.

Mr. Resner: That is absolutely the most novel expression I have ever heard, that a man's state of mind has something to do with contributory negligence.

(Testimony of Frank Luehr.)

Mr. Harrison: I think that is an excellent expression.

The Court: I indicated to Mr. Harrison it is splitting a pretty fine hair, but I will allow it so you will not be disappointed; but I want to indicate to you I am not taking it too seriously.

Mr. Harrison: I understand that, your Honor.

Q. (By Mr. Harrison): Let me ask you, Mr. Luehr, as to whether [208] or not you felt you were particularly agile at the time of the accident?

A. Just what do you mean by that?

Q. Do you feel that you were—well, let's put it this way, strong, had a good sense of balance, in as good a condition, as, say, the other men who were required to work around with you?

A. I think I was.

Q. Do you think that your agility, that is, your ability to go quickly and to retain your balance in high places was as good at the age of 52 as it had been in previous years?

A. Just what is the question again, please?

Q. Well, I will rephrase the question. Don't you agree that due to your age, 52 years old, you were not as agile and strong and as stable as you had been in previous years, say when you were 25 or 30?

A. After a person gets a little older it is natural they are not quite as fast on their feet, probably, or probably not quite as strong; but I think as far as work is concerned, I have always kept up my end of any kind of work that I have done on the waterfront.

(Testimony of Frank Luehr.)

Q. Do you think you could climb about these beams as well as a 25 or 30 year old man?

A. I think I can.

Q. Despite the fact that you were at that time 52 years [209] of age? A. That's right.

Q. Mr. Luehr, is it customary in your experience as a stevedore to steady cargo from underneath it while it is suspended in the air? A. No, sir.

Q. It isn't customary? Who was your boss on this job?

A. Mr. Spirz was the walking boss, and a fellow by the name of Martin—I don't remember his last name—was the gang boss.

Q. If I said Ingbritsen, would that be it? Martin Ingbritsen?

A. Yes, that sounds like the name, yes.

Q. Mr. Luehr, who directed you to go and help steady that airplane? A. Nobody.

Q. You took that on yourself, is that correct?

A. It was my job. That is what I was there for.

Q. Well, who told you that was your job?

A. I was hired out to go on the ship to go to work.

Q. If orders were to be given, who would give them to you?

A. I think it would be Mr. Spirz' orders at that time.

Q. But Mr. Spirz didn't specifically order you to go on that particular job, is that correct?

A. No, sir. [210]

Q. Did Mr. Spirz give you any indication that

(Testimony of Frank Luehr.)

he approved of the manner in which you were doing the job?

Mr. Kay: Just a minute. That is calling for an opinion and conclusion of the witness.

Mr. Harrison: I am asking him if——

Mr. Kay: Just a moment. Let me finish my objection. Calling for an opinion and conclusion of the witness and no foundation laid.

The Court: Who is Spurz, again?

Mr. Harrison: He is the walking boss.

The Court: Read the question, Mr. Reporter.

(Question read by the Reporter.)

The Court: Did he say anything to you in relation to that?

A. No, your Honor.

Q. (By Mr. Harrison): Was he also steadying the plane during this time? A. Was he what?

Q. Was he steadying the plane at this time?

The Court: Steadying the plane.

A. Well, so far as I remember he was on the catwalk at all times when the plane was being lowered. In fact, he wasn't a working man. He was the boss of the working men, and if he was needed there to help steady the plane, why, I think [211] he did.

Q. Mr. Luehr, do you recall some time in February, 1951, signing the original libel which was filed in this case? A. Signing what?

Q. Signing it. Affixing your name to the original libel.

(Testimony of Frank Luehr.)

Mr. Resner: Better explain to Mr. Luehr what a libel is.

Mr. Harrison: Yes.

Q. (By Mr. Harrison): A libel is the complaint you have filed in this case, the action which you filed against the Government, or cause to be filed.

A. Yes, sir.

Q. You did sign that, did you not?

A. Yes, sir.

Q. And your signature was notarized, was it not? A. I imagine it was at that time.

Q. And do you know that in front of your signature these words appear:

“Frank Luehr, being first duly sworn, deposes and says that he is the libelant in the within action; that he has read the libel herein and knows the contents hereof; that the matters therein alleged are true to his own knowledge, except those matters therein alleged on his information and belief, and he believes those to be true.”

Now, you signed that, did you not, Mr. [212] Luehr?

A. Yes, sir.

Q. And you believed the allegations in that libel to be true; is that correct? A. Yes, sir.

Q. Is it not true that in paragraph 12 of the original libel—

Mr. Harrison: Which, your Honor, appears on page 4—

Q. (By Mr. Harrison, continuing): —you al-

(Testimony of Frank Luehr.)

leged that you were making at the time of the accident approximately \$100 a week?

A. At the time of the accident?

Q. Yes. Does it not appear in this libel to which you have sworn?

A. I don't remember just exactly how much I was making.

Q. I am asking you, does it or does it not appear in the libel which you signed and swore to?

Mr. Resner: Well, if your Honor please, the libel speaks for itself. What is in it is there, and as your Honor knows all these papers are drawn by the attorneys.

Mr. Harrison: I am asking the witness——

The Court: He wants a record on it.

Mr. Resner: I beg your pardon?

The Court: He wants a record on it.

Mr. Resner: It is in the Court's files, Judge.

Mr. Harrison: I want to know whether this man knew it [213] was there at the time he swore to it, or whether or not it was there at the time he swore to it. I have here a photostatic copy. I believe the original is in the file. With your consent, Mr. Resner, I will cross-examine on the photostatic copy.

Mr. Resner: I have no objection. It is in there. I will say this, the lawyers put the statement in, they might have been mistaken about it, but it is inconsequential. Go ahead.

Q. (By Mr. Harrison): I am asking you, Mr. Luehr, did you swear at the time you signed this libel that to the best of your knowledge you were making approximately \$100 a week?

(Testimony of Frank Luehr.)

A. I probably was making approximately that. I don't think I made quite that much at that time.

Q. However, you were willing to swear you were making approximately \$100 a week; is that correct?

A. Yes, that is correct.

Mr. Resner: The record will show, Mr. Harrison, there were weeks when the man made more than that. Of course, some weeks he didn't work, depending on the available work.

Mr. Harrison: May I ask the Court's indulgence in asking Mr. Resner not to argue his case during my examination of the witness?

Mr. Resner: I am sorry, Mr. Harrison.

The Court: You will get used to him. He has been doing [214] that so long and he has the habit of doing it, and I realize it would annoy you, but I have been here so long that anything can't annoy me. Don't pay too much attention to it.

Mr. Harrison: I suggest his argument just then suggested further answers to the questions.

Mr. Resner: That is common knowledge to anybody in the industry.

Q. (By Mr. Harrison): Mr. Luehr, you testified yesterday on January 1st, 1950, the year of the accident, until the day of the accident you earned \$1,548.78? A. Yes, sir.

Q. From January 1st, 1950, to July 28, 1950, the day of the accident, is approximately 29 weeks. If we divide \$1,548 by 29 weeks, it means that your average earnings from the beginning of that year until the time of the accident was \$54 a week. Is that correct?

(Testimony of Frank Luehr.)

A. I don't know what it adds up to. I really couldn't say. All I can say, I might have made much more than that one week and I might have made much less than that.

Q. Mr. Luehr, you swore at the time you signed this libel your earnings were \$100 a week at the time you were injured. [215]

Mr. Resner: Now, your Honor please, I am going to object to this as being incompetent, irrelevant and immaterial. You can argue that to the Court. He is complaining about the thing that I am even at this time making arguments to your Honor.

Mr. Harrison: Not making arguments, your Honor, asking the man what the average earnings were during that period.

Mr. Resner: The Court will take judicial notice of the multiplication table.

The Court. This is what has occurred to me. Counsel is here asking for \$200,000 in the hope that he will get that, and no more. Now, the record here discloses an allegation there that he is making a hundred dollars a week. The answer to that is what the record will respond to, not what he thinks about it or anything. You have got a right to make that showing, that is the fact, let us analyze those facts.

Mr. Harrison: I would like also to indicate to your Honor that the libelant had a tendency at least, on the basis of \$23.50, to at least multiply the truth by two.

(Testimony of Frank Luehr.)

Mr. Resner: Now, Mr. Harrison, you know as well as I do that lawyers draw pleadings and they draw them on the basis of the best facts available to them. You are not going to accuse Mr. Luehr of something that his lawyers have done on the information available to them in the industry.

Mr. Harrison: My practice, Mr. Resner, is to ask the [216] client how much he is making before he signs the verification.

Mr. Resner: Well, Mr. Harrison, if we want to get into the business affairs, the discussions we have had, I will be glad to advise His Honor in full, with you.

Mr. Harrison: I most certainly will not, we agreed not to discuss such things.

Mr. Resner: All right, then who is kidding who.

Q. (By Mr. Harrison): Mr. Luehr, let me ask you one more question.

The Court: Don't throw your wrath on me. There seems to be some little difficulty before you.

Q. (By Mr. Harrison): Let me ask you this question: How much income did you report on your income tax form for the year 1950?

A. How much did I? You mean, receive from the Government?

Q. No, how much did you—what was your earnings that you alleged in your income tax?

A. In 1950?

Q. In 1950. I believe yesterday you testified—

A. \$1500.

Q. Your income tax return showed \$1548.78?

(Testimony of Frank Luehr.)

A. That's correct.

Q. Now, if you earned, as you alleged in your libel, an average of \$100 a week for the 29 weeks that you worked, isn't it true that—\$100 a month, rather—isn't it [217] true you would have reported considerably more income than \$1548.78?

Mr. Resner: Now, if your Honor please, that is calling for the opinion and conclusion, and that is argumentative. The income tax return is here, we put it in evidence, and Mr. Harrison, how he got it, I don't know, or how the Government does a lot of these things, is a mystery to me, but he himself got the income tax return from the Internal Revenue, got the information from the Internal Revenue. Here it is, it is no secret.

Mr. Harrison: I am merely pointing out, your Honor, that if the allegation that he earned \$100 a week is true, an average of \$100 a week is true, he should have reported about \$2900 earnings instead of \$1500. Now, if that is argumentative I will argue.

Mr. Resner: I think you should.

Q. (By Mr. Harrison): You remember how much your take home pay was out of your earnings?

A. No, as I said before, some weeks I made much more than I did other weeks.

Q. How many exemptions did you claim on your income tax

A. Just one.

Q. Just yourself?

Mr. Resner: In 1950?

(Testimony of Frank Luehr.)

Mr. Harrison: In 1950. [218]

Q. Do you know exactly how much you received by way of compensation to date, Mr. Luehr?

A. Yes, I think it is around \$3,000.

Q. Around \$3,000. How much did you receive a week? A. \$33.32.

Q. \$33.32. Have you always been receiving \$33.32? A. Yes, sir.

Q. Isn't it true that for a while you received \$35 a week? A. No, sir.

Q. You never received \$35 a week?

A. No, sir.

Mr. Harrison: Excuse me, your Honor.

Q. You are sure you never received a check for \$35 a week?

A. Oh, yes, I was just going to call your attention to it, they did send me a \$35 a week, I don't know how many weeks, maybe a month or maybe six weeks, but then that was *the* deducted off of one of those checks, so it would make me \$33.32 all the way through.

Q. Now, that is correct. Now, do you know why they reduced it from \$35 a week to \$33.32?

A. No, I do not.

Q. You do not know? A. I do not know.

Q. Did you inquire?

A. No, I did not. [219]

Q. Do you have any idea what the medical expenses have been taking care of you in your case, Mr. Luehr?

(Testimony of Frank Luehr.)

A. We—I was told in the neighborhood of around \$7,000.

Q. Have you any complaint concerning the treatment that you were given?

A. Not one bit.

Q. Mr. Luehr, we noticed your difficulty in walking here, how long have you been able to walk on a cane? A. You mean my cane alone?

Q. Yes, sir.

A. I don't remember exactly, but it must be probably a little over three months now.

Q. How long were you on crutches?

A. Ever since I have been out of the hospital.

Q. Except for this three months?

A. That's right.

Q. Were you confined pretty much to the house while you were on crutches?

A. When I first came home I didn't go out only when I had to go to the doctor; that was twice a week. And I used my crutches to get from the house to the cab at that time, and the cab to the hospital.

Q. I see. Did you gradually improve though, to get out more frequently?

A. Not with my cast on. I walked very [220] little.

Q. Then is it your testimony except for trips to the doctor you were confined to the house?

A. Was I confined to the house, did you say?

Q. Yes, except for the trips to the doctor?

A. No, the doctor didn't tell me not to walk on

(Testimony of Frank Luehr.)

it, he told me to step on my leg if it was possible, you know, if it didn't pain me too much.

Q. Well, did you do anything other than stay in the house and go back and forth to the doctor?

A. No, sir. Oh, maybe occasionally to the store and back, which is next door.

Q. Didn't you find an occasion to visit your attorney in Los Angeles? A. Did I what?

Q. Didn't you find an occasion to visit your attorney in Los Angeles? A. No, sir.

Q. You never went to Los Angeles?

A. No, sir.

Mr. Resner: I visited him many times, Mr. Harrison, and Mr. Magana. We came to see him often.

Q. (By Mr. Harrison): How old are you now, Mr. Luehr? A. 53.

Q. 53. Well, you say you were in good health at the time of this accident, is that correct? [221]

A. Yes, sir.

Q. How much did you weigh at the time of the accident?

A. I think about a hundred and ninety-eight pounds.

Q. About a hundred and ninety-eight pounds, very close to two hundred. What do you weigh now?

A. I think around about a hundred and nienty, I would say.

Q. Mr. Luehr, how long do you think you would have remained working as a stevedore had this accident not occurred?

(Testimony of Frank Luehr.)

A. Well, that is pretty hard to tell.

Q. Can you give us an estimate?

A. Well, if this accident hadn't occurred I would have probably worked as a stevedore for maybe quite some time.

Q. Well, Mr. Luehr, you think you would have worked until you were 75 years old?

A. Well, that is pretty old being on the waterfront.

Q. How about 65 years old?

A. Well, that is ten years younger, that is possible that I would still be there.

Q. You might be still there at 65?

A. Possibly.

Q. Probably not much after that, is that correct?

A. I don't know, it is awfully hard to answer.

Q. How much in earnings do you believe that you have lost to date?

A. You mean from the time of the [222] accident?

Q. Yes, till now.

A. Well, considerable. At the time of the accident, at the time about one month after the Korea war occurred, and from then on the work had been plentiful. I know that some of the men probably have made five thousand or more just this last year in 1951.

Q. Wasn't the work equally as plentiful in World War II? A. Was it plentiful?

Q. Yes.

(Testimony of Frank Luehr.)

A. Yes, I think it was quite plentiful at that time.

Q. You remember what you earned in those years?

A. Well, the wages were much lower than what they are now. I think we were making only, it seems to me it was \$1.15 at that time.

Q. Do you remember, any idea what you earned in those years, though?

A. No, I couldn't say.

Q. Mr. Luehr, do you want to go back to work if something can be found that you can do?

Mr. Resner: Now, if your Honor please, I think that is irrelevant because that depends upon the medical testimony as to what the doctors think.

Mr. Harrison: I qualified it by saying if something can be found that he can do.

Mr. Resner: If you are going to offer him a job at the [223] wages he was earning as a longshoreman at something he can do, I think he will take it.

Mr. Harrison: I am not going to offer him a job, but would like to show that he can certainly earn something which must be deducted from his future loss or earnings.

The Court: If you can show that.

Mr. Harrison: Well, I think I would like to know how the witness feels about it.

Q. You wouldn't like to go back to work at something if you could do it?

A. Certainly. I worked hard all my life.

Q. What are you doing with yourself all day now?
A. Read, listen to the radio.

(Testimony of Frank Luehr.)

Q. M-hm. Have you ever thought about preparing yourself for some other kind of work?

A. I have not.

Q. Have you attempted to learn any skill with your hands? A. No.

Q. Have you attempted to learn some paper work, task, at all?

A. No, I never had—I never had the opportunity to do that at all.

Q. Well, have you taken the last year and a half where you have been laid up too—have you taken that opportunity? A. No, sir.

Q. To try to improve yourself in any way so that you might [224] take a task, a sedentary job should it be offered to you?

A. No, sir, I haven't.

Q. Why haven't you?

A. Well, I guess I never thought about it, maybe thinking that if I ever get strong again I would go back to work again.

Q. You know that a man in your condition is not necessarily confined to an idle life the rest of your life. I give you as an example the boys that are shot up in Korea, and in the last year, the amputees, and so forth, that come back. We have had some marvelous examples of the boys who have made for themselves a useful life even though they have lost the use of their limbs. Did you ever consider that, Mr. Luehr? A. Oh, yes.

Q. And yet you chose not to do anything about it?

(Testimony of Frank Luehr.)

A. I can't do anything at the present time; I can't do a thing.

Q. You can read, can't you?

A. Read? Oh, yes, I can read.

Q. You could, if you get to and from the doctor, you could get to and from some class in hand skills, could you not?

A. How can I work in the condition I am in, with a painful back?

Q. Is it your testimony that you couldn't study any kind of skill with your hands or practice a skill with your hands at this time? [225]

Q. We realize that. Getting back to the accident, Mr. Luehr, how long were you on the mechano deck before you were knocked off?

A. Well, now. I don't remember the—just the amount of minutes or what it would be, but I do remember climbing on to the mechano deck when the plane was in such a position over the structure that it could be lowered. Now, just where the plane was at the time that I got on the mechano deck, I don't remember, exactly, maybe we will say 30 feet.

Q. M-hm. But you climbed up on it after you saw that the plane was coming on the inboard side of the ship? A. Yes, sir.

Q. Now, I'm still not clear exactly where you were with relation to the airplane at the time of your injury. Could you describe that for us once again exactly where you were and why you were there?

A. When I climbed on to the mechano deck, like

(Testimony of Frank Luehr.)

I say, there was no ladder there, just get on the best way you know how.

Q. How did you get up there?

A. I don't remember just—you see that brace going, you might climb up on that brace.

Q. I see.

A. One way or another. I was on this beam on the inshore side. I wasn't in any way of the plane if it would have dropped that I would have got hurt at that time. But as the [226] plane was coming down to about, I would say, six feet, I mean between—of the mechano deck, the plane to the mechano deck, the plane stopped. The man, what they call the whistler, blew his whistle, and the plane stopped, and as it stopped I walked forward to help steady the plane.

Q. Walked forward. Did you proceed along one of those beams?

A. Just on one of those beams, yes.

Q. M-hm. Now, what position did you assume by or underneath the airplane?

A. Well, it is a man's job to do the best he can by steadying the plane so as the wings are not damaged, the fuselage is not damaged in any way, and I just imagine that this plane was probably stopped at that time, that maybe the wing was so in the position that it probably could have hit something. Why it stopped, I don't know. But as I walked over I grabbed ahold of this plane as quick as possible to keep it from going this way, you know, when you're on a ship and the plane is on a barge,

(Testimony of Frank Luehr.)

there is always a little give, you know, to it, and it probably doesn't stand still at all times, so you have to steady these.

Now, the best I remember is that I grabbed ahold of this plane with my left hand in the position which would be on that strut, nothing else to get ahold of, what they call the tripod, and my right hand on the fuselage in this position (indicating).

Q. I see. Why was your right hand on the fuselage, was that [227] to steady yourself?

A. Probably to help steady——

Q. Steady the plane or yourself?

A. I can't stand over here.

Q. Why not?

A. How can—I would have fallen off.

Q. You would have fallen onto the——

A. Fallen off to the main deck.

Q. That is why, so that your other hand on the plane was to steady yourself primarily?

A. That's correct. Now, when I had hold of this plane trying to steady it—the whole plane dropped so fast. Now just exactly what hit me, whether the fuselage or the wing, I don't remember, but it dropped just as though the line was cut, and the whole plane—I don't know what it weighs, probably four ton, five ton, I don't know what it is came down so fast it hit me on my left shoulder, and as it did it threw me forward with my head hanging to the main deck.

Q. I think we all understand that; all I was

(Testimony of Frank Luehr.)

getting at was the position which you assumed near the airplane.

Now, I want to be clear, were you standing on an athwartship beam or on a fore and aft beam?

A. On an athwartship beam.

Q. Have you ever stood on one of these fore and aft beams, did you at any time during this operation stand on one of those fore and aft [228] beams? A. Not at this time.

Q. Did you, when you were walking about?

A. I might have, I don't remember.

Q. How high from the deck did you feel that you were, how high is the mechano deck, in your estimate? A. You mean from the main deck?

Q. Yes.

A. Well, I assume it is around seven feet, eight feet.

Q. Seven or eight feet. Were there any walking boards or scaffolding placed on the mechano deck to make for better footing? A. No, sir.

Q. There were not. Were there any platforms strung beneath this mechano deck, such as the kind of platforms that hang over the side for the use of men going to paint, I think you know what I mean, kind of suspended on ropes or metal hooks?

A. Nothing like that.

Q. No platform? A. Not that I recall.

Q. Were there any ropes or lines you could hold onto that you could steady yourself with while you were on the mechano deck?

A. Not in the business I was in. The lines that

(Testimony of Frank Luehr.)

they use are probably way out on this wing or in this wing, and forward and not on the after end of the plane. [229]

Q. Well, were there any other ropes or lines not attached to the airplane which you could have held onto to steady you? A. No, sir.

Q. No ropes were strung at all on the superstructure of the vessel? A. No.

Q. Did you see any safety precautions that were taken to prevent the men from falling, being thrown to the deck below?

Mr. Kay: Just a moment. I object to the form of the question, the words "safety precautions," it calls for his conclusion. Furthermore, it would call for the conclusion of an expert and he hasn't been qualified as an expert, and the term "safety" is entirely relative.

Mr. Resner: I might point out something else to Your Honor that counsel for the government seems to overlook.

Mr. Harrison: Mr. Resner, are you going to argue that again?

Mr. Resner: I am making an objection if I can, Mr. Harrison. First, I will say, Mr. Harrison, that the question calls for the opinion and conclusion of the witness; that it is objectionable because it is incompetent, irrelevant and immaterial, and in support of that I will tell your Honor that this vessel was built by the United States, they owned it.

Mr. Harrison: Isn't that argument?

(Testimony of Frank Luehr.)

Mr. Resner: Built the superstructure. Well, may I proceed, [230] Mr. Harrison?

They built the ship, they gave it to the men and said here, use it to load planes on it. Now, these men don't have any choice, they work where they are told and, therefore, his opinion and conclusion about it is completely irrelevant.

The Court: His objection goes to your arguing the case. The jury is absent, you are arguing the merits of the case to me. You recognize that you have a legal right to object legally to the question. Now, let us read the question.

(Question read by the Reporter.)

Mr. Kay: Your Honor, the further objection that no proper foundation has been laid, no showing here that any safety precautions were required, and it would be beyond the scope of the direct examination, not proper cross-examination.

Mr. Harrison: Your Honor please, I asked if there were walking boards, scaffolding, platforms, lines to steady himself and he said no to all those. Now, it is to avoid the possibility that I have missed any other apparatus that may have been rigged to prevent the men from falling that I have asked him. I will change the words "safety precautions" to "apparatus."

Mr. Kay: That is different. I mean, if he is asking him about specific things that were or were not there, then the man can answer.

The Court: Very well. [231]

(Testimony of Frank Luehr.)

Q. (By Mr. Harrison): Then to cover all possibilities I will ask you whether any apparatus placed on that mechano deck to prevent the men from falling to the main deck below?

Mr. Kay: I am going to object again, your Honor. It calls for the conclusion of the witness, the words, "To prevent the men from falling below," that takes in a lot of territory. He can ask this witness if there were, as he has already asked, any lines, any ropes, any platforms, or any other objects.

The Court: I suggest you reframe your question. The objection will be sustained.

Mr. Harrison: I believe I have taken in all the possibilities that I can think of, your Honor. I am not a stevedore and I don't know what—

The Court: We will make a stevedore out of you before you get through.

Q. (By Mr. Harrison): I will ask you this, Mr. Luehr: Was there any place where you could have stepped back to avoid being thrown to the main deck when this plane fell?

Mr. Resner: I object to that, your Honor, on the ground the witness testified this thing came so fast he didn't have a chance to do anything.

Mr. Harrison: If he did have a chance, was there a place to step?

The Court: Overruled; you may answer. You understand [232] the question?

The Witness: Yes, I do.

The Court: You may answer.

(Testimony of Frank Luehr.)

A. No, there was no place of any kind to go to. I couldn't step back nohow.

Q. (By Mr. Harrison): In fact, if you had taken any motion at all to avoid this airplane you probably would have fallen to the main deck, I take it? A. That is correct.

Mr. Kay: Your Honor—

The Court: Let me offer a suggestion. You see where we are going. I think we are all agreed this thing came down! Where could he go under circumstances of that kind?

Mr. Harrison: Well, if your Honor please, the Government's contention is this—

The Court: I say that advisedly.

Mr. Harrison: Yes. May I explain the purpose of these questions is that we feel that the steadying of the airplane—I am not talking about placing the platforms underneath the landing gear—the steadying of the airplane did not necessitate the man being directly underneath the airplane. If there had been places for him to stand other than underneath the airplane if they had planking or walking boards, he could have done this job standing, as the safety code provides, out of the fall of the cargo. Now, it is our contention that— [233-4]

The Court: It would be hard for me to follow that if I was sitting as a juror. Now, you may not be able to make some sort of showing, keeping in mind this airplane, as far as the record is concerned, you have to take the physical facts as they are there, and to say that you can't get under,

(Testimony of Frank Luehr.)

shouldn't get under an airplane when it is coming down, it would be hard for me to say you could or could not.

Mr. Harrison: If your Honor please——

The Court: She swaying, and what not.

Mr. Harrison: Well, the sway is exactly one of our arguments, your Honor, that the very sway of the airplane could have knocked this man off the mechano deck and that the reason that he had to go under it to steady it was that there was no place else for him to stand in that there was no place for him to steady it, he could have done the job, had there been space for him to stand by steadying against the wings. We will show that there were numerous men steadying this airplane.

The Court: I don't know the theory of the case, but who built that?

Mr. Harrison: That, I believe, was built by Kaiser Shipyards in Portland, your Honor.

The Court: Under whose instruction?

Mr. Harrison: I believe it was the Government.

The Court: If it is defective how can the Government [235] complain?

Mr. Harrison: I am not saying that it is defective, I am saying, your Honor, it has an inherent danger which could have been corrected by providing boards.

The Court: However, I don't want to interfere.

Mr. Harrison: I think that we are all in agreement as to what did happen, and there were no

(Testimony of Frank Luehr.)

boards provided, and the rest is really a matter of argument.

I was going to ask the witness as my next question why was it necessary to stand directly underneath or so close to this suspended airplane?

The Court: You may answer.

The Witness: Can I stand up and show you?

Q. (By Mr. Harrison): Sure.

A. When you're standing on a six or eight-inch beam, I don't know what they are, when you stand in this position and the plane is over here (indicating), how can you hold it? You can't steady it, you can't do anything. I was standing in the position like this with my left foot over the beam, the plane was over, we will say, in this position. I was reached like this, under, holding the strut, and probably with this hand maybe in this position on the fuselage. That position, why, I am that far underneath the plane.

Q. Then it is your testimony that it was necessary to stand in that position because there wasn't any other place to [236] stand?

A. Wasn't any place to stand, and you can't steady the plane by holding against it, because nothing there to hold.

The Court: We will take a recess.

(Short recess.) [236-A]

Mr. Harrison: I only have one or two more questions, your Honor.

Q. (By Mr. Harrison): I just want to make

(Testimony of Frank Luehr.)

it very clear in the record, Mr. Luehr, did you take orders from anyone else other than employees of the Jones Stevedoring Company?

A. Meaning Mr. Spirz?

Q. Mr. Spirz and Mr. Ingbritsen?

A. That is right. No other.

Q. No one else? A. No one else.

Q. Did Mr. Rosenstock ever give you any orders at all?

A. No. I don't even know the man.

Q. You don't even know who Mr. Rosenstock is?

A. No.

Mr. Harrison: I believe that is the only thing I have, your Honor.

Cross-Examination

By Mr. Kay:

Q. Mr. Luehr, after this plane came over and was put in this position where it was held still, at which time you went over there and took hold of the strut with your left hand and a hold of the fuselage with your right hand, the next succeeding operation that you were going to do was to push that and have that go down and land on that platform that is on this mechano deck; is that correct?

A. That is correct. [237]

Q. And whether there were any planks or not on the mechano deck, you had to stand where you were to do that particular job; is that correct?

A. That is correct.

Mr. Harrison: I object to this line of question-

(Testimony of Frank Luehr.)

ing. The witness testified he was there to steady the airplane.

Mr. Kay: Why, your Honor, this is cross-examination. He has had his cross-examination and I am entitled to cross-examine within the direct examination and within any questions Mr. Harrison has asked on cross-examination.

The Court: The objection may be overruled. Proceed.

Mr. Kay: May I have the question and answer reread?

(Question and answer read by the reporter.)

Q. (By Mr. Kay): Now, the strut you had hold of is the part of the plane on which the wheel would normally be, is that correct? In other words, instead of a wheel they had this tripod in that position in libelant's Exhibit 14; is that correct?

A. That is right.

Q. That tripod down there (indicating)?

Mr. Kay: You see that, your Honor?

The Court: Yes.

Q. (By Mr. Kay): That tripod and that strut is underneath the wing of the plane, out a little bit from the fuselage; isn't that correct? [238]

A. Yes.

Q. And in order to hold onto that you have to get somewhat under the plane; isn't that correct?

A. That is correct.

Q. Now, Mr. Luehr, if there had been planks as the Government suggests, and you were doing this same job, and the plane came down just the way

(Testimony of Frank Luehr.)

it did in this instance, as though the lines had been cut, giving you no warning, and with a sudden drop like that (snapping fingers), and if there had been planking on that area, what would have happened to you?

Mr. Harrison: Following Mr. Kay's method of trying this case, I object as asking for an assumption of the witness.

Mr. Kay: No, the witness is there.

Q. (By Mr. Kay): You can visualize the planking? Let's assume there was planking there; is that correct?

Mr. Harrison: There wasn't. He testified there wasn't.

Mr. Kay: The Government says we should have planking.

Mr. Harrison: You are asking him to assume what would happen, isn't that a better phrasing of the question?

Mr. Kay: No, based on your assumption, I think he can answer the question.

Q. (By Mr. Kay): Do you understand my question?

A. I understand what you mean.

Q. Will you be able to answer it? [239]

A. In the position that I was standing at the time, or in the position that I would have been standing if there had been planking there, there wouldn't be any difference. I would have still had to be in the same place, partly underneath this particular plane.

(Testimony of Frank Luehr.)

Q. All right, let me ask you this: When you got hurt, you say you were crushed down and your head hanging down below that beam here. As I understand, one foot was over on this side, the left foot was on this side of the fore and aft beam out here, and when you were hit you were crushed down and the left foot remained over, and your head hanging down below this thwartship beam, is that correct, after you were hit by the plane?

A. Yes, that is right.

Q. And your hands hanging down to the deck; is that correct? A. That is right.

Q. And when the plane bounced back or was taken back, whichever it was, you were released and you slid down to the deck; is that correct?

A. That is correct.

Q. If there had been planking over here, your body and your head wouldn't be down in that position. You would be right against the planking; is that correct? A. That is right.

Q. And in that case you might have been crushed to death? [240]

A. I wouldn't be here to tell about it.

Mr. Kay: That is all.

Mr. Harrison: Well, let's get this straight, your Honor—

The Court: Pardon me.

Mr. Harrison: Oh, excuse me.

Mr. Cooper: If the Court please, counsel seems to make speeches, so I can be permitted to do so, may I not? I might say, your Honor, I was brought

(Testimony of Frank Luehr.)

up in the Sacramento Valley and we used to get up a sweat there in the harvest season.

Cross-Examination

By Mr. Cooper:

Q. I wanted to ask you, Mr. Luehr, I believe you testified you worked in the Sacramento Valley in the harvest season?

A. Will you speak up a little louder?

Q. I say, did you work in the Sacramento Valley in the vicinity of Willows in the harvest season?

A. Yes.

Q. Did you ever work on a combine harvester?

A. Well, running tractors, mostly.

Q. Never worked on a grain harvester?

A. That is correct.

Q. What job did you do?

A. What was that?

Q. I say, you say you worked on grain harvesters. What job [241] did you do on it?

A. Well, I was running a tractor most of the time, harvesting grain.

Q. Did you ever work on the combine itself?

A. Oh, yes.

Q. What did you do on it?

A. I don't remember. Probably tending harvester, I think.

Q. You were a header tender, were you not, what is called a header tender?

A. You can call it that.

Q. That is the man who sits on the seat and

(Testimony of Frank Luehr.)

lowers and raises the knife that cuts the grain; is that correct? A. That is correct.

Q. And that is what you call a header tender. At least, did when I was brought up. You sit there under an umbrella, as a rule, to protect you from the sun, do you not? A. I did what?

Q. I say you sit there under an umbrella to protect you from the sun, do you not?

A. Oh, yes.

Q. Mr. Luehr, you said before this unfortunate accident occurred you had climbed up on the mechano deck? You had climbed up on the mechano deck from the deck below; is that correct?

A. That is correct. [242]

Q. Had you previously worked on the mechano deck of that ship?

A. On that particular ship?

Q. Yes. A. Yes, sir; I had.

Q. You had been up there before?

A. Oh, yes.

Q. Had you performed the same sort of job up there before that you did at the time of the accident?

A. I don't remember. I don't recall if I did the same kind of job. Each time a plane comes, you might be in a different position. You may be holding onto a wing, you may be holding onto something else, stand at the end of the wing so that you can grab hold of it.

Q. So that different men took up any position they chose to take up; is that correct?

(Testimony of Frank Luehr.)

A. That is right.

Q. You didn't get any special order to do a special job? You took up whatever position the job seemed to require; is that right?

A. That is correct.

Q. And on other occasions you say you had hold of the wing of the plane?

A. When I say a hold of it, I mean on the end of the wing. You can't grab hold of the wing in the middle because you have [243] no way of holding it.

Q. I see. Then each time a plane was landed, would some of the men talk hold of the end of the wing, as you say? A. That is right.

Q. And you had done it on prior occasions?

A. Oh, yes.

Q. Did anybody take hold of the tail of the plane in order to steady it?

A. There is no tail.

Q. Pardon me? A. There is no tail.

Q. It is cut in the middle, is it? The tail had been cut off; is that correct?

A. The tail is cut off of the main part of the plane.

Q. Only part of the fuselage was with the plane?

A. Right behind the wheels.

Q. I see. So when you say—I guess another witness can tell me that, but on occasion did some of the men stand at the end of the fuselage, the rear end of the fuselage, and take hold of that?

(Testimony of Frank Luehr.)

A. This is the end (indicating). This is the rear end of the fuselage.

Q. This round object, is that the rear end or the front end?

A. That is the rear end of the fuselage. This pointing that [244] way is pointing toward the catwalk.

Q. I see. And that is the nose? That is the end, the one pointing toward the catwalk is the nose against which Mr. Spirz, the walking boss, had his hands; is that correct? A. That is right.

Q. Then this part here where it is cut off at about the wings, all you can do is push against that; is that so?

A. Yes. You can push against it, but you can't hold it in any way at all. There is no way of holding it. There is nothing to hold onto.

Q. You can just push against it from coming in your direction? A. That is right.

Q. What are these two objects I see on either side?

A. I don't know. Probably where the tail is connected to it.

Q. Mr. Luehr, after you had gotten on the mechano deck, and before you moved toward where the plane was hanging suspended, did you wait until the plane had stopped being lowered?

A. You mean before the accident?

Q. Yes. A. Yes.

Q. You are standing over on one side of the mechano deck on one of the beams?

(Testimony of Frank Luehr.)

A. That is right. [245]

Q. Did you wait until the plane reached a point of suspension before you moved over toward it?

A. Oh, yes.

Q. How many feet did you go, as near as you can recall, from where you were standing to get hold of the plane?

A. I would say maybe six feet, maybe eight feet. I don't know.

Q. In order to do that, you walked along the thwartship beams of the mechano deck; is that right?

A. That is right.

Mr. Cooper: That is all.

Mr. Harrison: I have one or two things I want to straighten out, your Honor.

Recross-Examination

By Mr. Harrison:

Q. I interpret your testimony to be, you were up there to steady the airplane?

A. That is right.

Q. Did you have the platform with you that was going to go underneath the wheel?

A. The platform already was underneath there.

Q. Did you have the bolts with you that they needed in fastening the landing gear to the platform?

A. No, sir.

Q. Were you going to fasten it?

A. No, sir. [246]

Q. You were there to steady it; is that right?

A. That is right.

Mr. Harrison: That is all; thank you.

Mr. Resner: We have no further questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Resner: Aside from our doctor, your Honor, that is the libelant's case, and our doctor, as we advised the Court earlier, will be here at two o'clock. Unless counsel has something, I would like to ask your Honor for a recess at this time, and Mr. Magana and I will spend the next half hour getting the medical records in shape so that we can expedite the examination this afternoon.

The Court: Is that agreeable, gentlemen?

Mr. Harrison: Agreeable, your Honor.

Mr. Kay: That is agreeable, your Honor.

The Court: Take a recess until two o'clock.

Mr. Resner: Judge, may we have a stipulation from counsel so that we can withdraw the medical records in order to arrange them and go through them? Have you any objection?

Mr. Harrison: No.

Mr. Kay: Stipulated.

(Thereupon, at 11:30 a.m., an adjournment was taken to the hour of two o'clock p.m. this date.) [247]